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In the

Supreme Court of the United States

October Term, 1933.

No. 114.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, and JESSE W. GREENLEAF, THURMAN HILL, and C. W. CAMPBELL, as members of said COMMISSION OF KANSAS, and HOMER HOCH, JESSE W. GREENLEAF and ERNEST E. BLINCOE, as members, substituted, and ROLAND BOYNTON, Attorney General of the State of Kansas, *Appellants*,

vs.

THE WICHITA GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE HUTCHINSON GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE NEWTON GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE PITTSBURG GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE CAPITAL GAS & ELECTRIC COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE GIRARD GAS COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

UNION PUBLIC SERVICE COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

THE WESTERN DISTRIBUTING COMPANY, a Corporation, *Appellee*.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF KANSAS, *et al.*, *Appellants*,

vs.

CITIES SERVICE GAS COMPANY, *Appellee*.

(Reported below 2 Fed. Supp. 792.)

BRIEF FOR APPELLEES

other than Cities Service Gas Company.

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INDEX.

	PAGE
Preliminary Statement	2
Summary of Argument	12
Jurisdiction	12
Jurisdiction on the Admitted Facts	30
Commission's Finding of Value, and Commission's Finding of Net Earnings	43
Application of Commission's Order, Commission's Finding of Value and Earnings as of June 30, 1932	44
Additions Which Should Be Made on Account of Failure to Apply Overheads to Lease Values	48
Findings of the Court Below	51
The Valuation	52
Account 1307—Production—Right of Way	61
Account 1327—Transmission—Right of Way	61
Account 1312—Production—Gas Well Construction	67
Account 1313—Production—Gas Well Equipment	67
Account 1314—Field Line Equipment	71
Account 1325—Transmission—Lane	74
Account 1328—Compressor Station Structures	74
Account 1331—Compressor Station Equipment	74
Account 1333—Transmission—Line Equipment	78
Engineering and Superintendence During Construction	89
Preliminary and Organization Expense	90
Administration and Legal Expense During Construction	90
Miscellaneous Construction Expenditures	91
Taxes During Construction	91

PAGE

Interest During Construction 91
Going Concern Value 95
Gas Leases 112
Hypothetical Pipe Line 134
Present Valuation and Prudent Investment 137
Conclusion as to Valuation 139
Rate Base During Each Annual Test Period 141
Net Income Before Depreciation and Depletion 147
Annual Depreciation and Depletion Requirements 149
Annual Depreciation 149
Annual Depreciation for Years Covered by Earning Statement 149
Annual Depletion Requirements—Gas Leases 151
General Development Expense Capitalized 151
Amortization of Non-Producing Leases 152
Dry Hole Expense 154
Fair Rate of Rate of Return 155
Effect of Commission's Order on Income 156
Rate of Return Under Commission's 30c Order 157
Decreased Income Due to Loss of Sales—Value of Domestic Service 158
Assigned Error No. 20 160
Conclusion 171

Table of Cases Cited.

	PAGE
Acquaokanonk Water Company v. Board of Public Utility Commissioners, 100 N. J. L. 169	126
Atchison, Topeka & Santa Fe R. R. Co. et al. v. U. S. et al., 284 U. S. 248	19
Chesapeake & Baltimore Telephone Co. of Va. v. Commonwealth, 136 S. E. 575	126
City of Erie v. Public Service Commission, 278 Pa. 512	128
Denver Union Stockyards Co. v. U. S., 57 Fed. (2d) 735	109
Logan Gas Company v. Public Utilities Commission of Ohio, 169 N. E. 575	132
Rockland Light & Power Co. v. Milo R. Maltbie et al., 148 Misc. 22	14
Smith v. Illinois Bell Telephone Company, 282 U. S. 133	18
Southwestern Bell Telephone Co. v. City of Ft. Smith, 294 Fed. 102	150
Spring Valley Water Company v. San Francisco, 165 Fed. 668	125
State ex rel. Columbia Telephone Co. v. Atkinson et al., — Mo. —, 195 S. W. 741	17, 26
United Gas & Fuel Co. v. Railroad Commission, 278 U. S. 320	125
United Railway & Electric Co. of Baltimore v. West, 280 U. S. 234	45
U. S. v. Los Angeles R. R., 273 U. S. 299	28

PAGE

Western Distributing Company v. Public Service Commission, 285 U. S. 119 ..... 5, 26

West St. Louis Water & Light Co. v. Public Service Commission of State of Missouri, 197 S. W. 340 18

Wichita Gas Co. v. Public Service Commission, 126 K. 220, 268 P. 111 ..... 4, 38

Wichita Gas Co. v. Public Service Commission, 3 Fed. Supp. 722 4

Wichita Railway & Light Company v. Public Utilities Commission of State of Kansas, 260 U. S. 48 .. 25

Statutes Cited.

Revised Statutes of Kansas 1923, Section 13-1204 36

Revised Statutes of Kansas 1923, Section 14-1701 40

Session Laws of Kansas 1931, Chapter 239 119

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other than Cities Service Gas Company.

PRELIMINARY STATEMENT.

The controversy herein involves two orders of the Public Service Commission of Kansas entered the 31st day of August, 1932, in proceedings held under the authority of Chapter 239 of the Session Laws of Kansas of 1931. The pertinent provisions of this statute are as follows:

Under Section 1, the Public Service Commission of the State is given jurisdiction over the holders of the voting capital stock of public utility companies, and access to all accounts and records of affiliated companies; and the Section sets out various definitions with respect to the powers granted and the utilities and affiliated interests affected by the statute.

Section 2 provides that no management, construction, engineering or similar contract made after the enactment of the statute with any affiliated interest shall be effective until filed with the Commission.

Section 3, which is the only section under which the proceedings had and complained of herein could be said to have been authorized is as follows:

> "In ascertaining the reasonableness of a rate or charge to be made by a public utility, no charge for services rendered by a holding or affiliated company, or charge for material or commodity furnished or purchased from a holding or affiliated company, shall be given consideration in determining a reasonable rate or charge unless there be a showing made by the utility affected by the rate or charge as to the actual cost to the holding or affiliated company furnishing such service and material or commodity. Such showing shall consist of an itemized statement furnished by the utility setting out in detail the

various items, cost for services rendered and material or commodity furnished by the holding or affiliated company."

The statute above quoted became effective March 9th, 1931; and on July 2nd, 1931, the then Public Service Commission of the State of Kansas issued an order which is attached to the Bill of Complaint herein, as Exhibit "A," in its docket number 13127, entitled "In the Matter of the Investigation of the Reasonableness of Contracts, and Charges Made by Holding Companies to Subsidiary Companies of the Cities Service Company." (R. 25.)

Under the provisions of this order, three separate and distinct contracts were listed for investigation as follows:

1. The contract under which the several distributing companies in Kansas, being all of the Appellees herein other than the Cities Service Gas Company, paid to the Cities Service Gas Company for gas for domestic purposes approximately the sum of forty cents (40c) per thousand cubic feet at their respective city gates.

2. Payments made to The Gas Service Company for services rendered, by it to the several distributing companies, appellees herein.

3. Payments made to Henry L. Doherty & Company by the several appellees in the sum equal to 1¾% of their gross revenues in return for services rendered by said Henry L. Doherty & Company.

The Public Service Commission of Kansas and the court below found that the payments made by the several distributing companies to The Gas Service Company were proper and approved the same, and no appeal has been

taken by any of the Appellees from the decision of the court below with respect to its ruling as to the contract with Henry L. Doherty & Company, so that this proceeding involves only the right of the Kansas Commission to investigate and determine in the manner undertaken by it, the reasonableness of the forty cent (40c) city gate rate paid by the several distributing companies, Appellees herein, to the Cities Service Gas Company, an affiliated company.

The reasonableness of this forty cent (40c) city gate rate was litigated in proceedings brought by the City of Wichita, and its reasonableness was upheld by the Supreme Court of Kansas in a decision rendered June 9, 1928, in the case of *The Wichita Gas Company* v. *The Public Service Commission,* 126 Ks. 220; 268 Pacific 111, that company being one of the Appellees herein.

The reasonableness of this rate was again upheld by the United States District Court for the District of Kansas in the subsequent case of *The Wichita Gas Company* v. *The Public Service Commission,* decided May 28, 1930, and reported in 3 Fed. Sup. 722.

Within a very few months after the decision last cited was rendered, the Kansas Public Service Commission called for hearing the application of The Western Distributing Company for an increase in rates in the city of El Dorado, that company contending that it was not at the time making its operating expenses. In the course of that proceeding and notwithstanding the two prior decisions as to the reasonableness of the forty cent (40c) city gate rate, the Commission required the applicant to again make a showing as to the reasonableness of that rate. The applicant contended that the cost would be prohibitive, introduced the two prior decisions, and refused to make a further showing. The

application for an increase in rates was thereupon dismissed; and The Western Distributing Company took its case to a three-judge court in the District of Kansas, and from an adverse decision appealed to this Court which affirmed the decision of the lower court as reported in the case of *The Western Distributing Company* v. *The Public Service Commission,* 285 U. S. 119.

When this proceeding instituted by the Kansas Public Service Commission on its own motion was called for hearing (R. 25), the several distributing companies, Appellees herein, entered their special appearance objecting to the jurisdiction of the Commission as set out in Exhibit "B" (R. 27) to the Bill of Complaint herein. When the case came on for trial before the court below, Plaintiff waived the objection previously raised, set out in Exhibit "B" to the Bill of Complaint, that it was improperly joined with other distributing companies.

The Appellee distributing companies do, however, contend that in the proceeding ordered and held by the Kansas Commission there was no issue of a rate or charge to be made by a public utility, and that said Commission was not acting "in ascertaining the reasonableness of a rate or a charge to be made by a public utility," as is provided by the statute, which is the source of its authority to act.

In the proceeding before said Commission, it was repeatedly contended by the Commission and its attorneys that the proceeding did not involve the investigation of the rates charged by said distributing companies (the Appellees herein other than the Cities Service Gas Company), to their consumers in the respective cities served by them, and no opportunity was given to said distributing companies to show the value of their property or their experience under existing rates; and such oppor-

tunity, when repeatedly demanded, was expressly refused by said Commission. (R. 28, 44, 47, 51, 67, 371.)

In the several Bills of Complaint filed by the Appellee distributing companies respectively, the following allegations were made and proven without contradiction in the court below:

THE WICHITA GAS COMPANY. That the value of its property used and useful in rendering service to its consumers in the city of Wichita, Kansas, was $2,872,854; that its gross earnings for the year ending June 30th, 1932, were $1,818,850; that its net earnings applicable to depreciation and return for said period were $181,096; and that if certain salary reductions had been in effect during said entire period, its net earnings would have been $205,434.00, or an earning of only 7.2% for all purposes of depreciation and return on the present fair value of its property.

THE HUTCHINSON GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Hutchinson, Kansas, was $584,169; its gross earnings for the year ending June 30th, 1932, were $426,678; and that as a result of its operations for the year ending June 30th, 1932, it failed in the sum of $36,146 to make its operating expenses.

THE NEWTON GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Newton, Kansas, was $284,865; its gross earnings for the year ending June 30th, 1932, were $173,076; and that as a result of its operations for the year ending June 30th, 1932, it failed in the sum of $10,496 to make its operating expenses.

THE PITTSBURG GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Pittsburg, Kansas, was $379,772.00; its gross earnings for the year ending June 30th, 1932, were $153,297; that its net earnings applicable to depreciation and return for said period were $21,414; which, if adjusted to present conditions for salary reductions would have been $24,499 or an earning of only 6.5% for all purposes of depreciation and return on the present fair value of its property.

THE CAPITAL GAS & ELECTRIC COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Kansas City, was $3,398,092; that its gross earnings for the year ending June 30th, 1932, were $1,143,299; that its net earnings properly adjusted for salary reductions during that period would have been $160,495, or an earning of 4.7% for all purposes of depreciation and return on the present fair value of its property.

THE WYANDOTTE COUNTY GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consmers in the city of Kansas City, Kansas, was $3,769,687; that its gross earnings for the year ending June 30th, 1932, were $1,687,706; that its net earnings for said period after proper adjustment for salary reductions would have been $253,995 or a return of only 6.7% for all purposes of depreciation and return on the present fair value of its property.

THE GIRARD GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Girard, Kansas, was $46,545; that its gross earnings for the year ending June 30th,

1932, were $16,770; that its net earnings for said period after proper adjustments for salary reductions would have been $1,953 or an earning of 4.2% for all purposes of depreciation and return on the present fair value of its property.

UNION PUBLIC SERVICE COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the fifty-one (51) towns served by it was $2,779,839; that its gross earnings for the year ending June 30th, 1932, were $1,073,081; that its net earnings for said period after proper adjustments for salary reductions would have been $106,291 or an earning of 3.8% for all purposes of depreciation and return on the present fair value of its property.

THE WESTERN DISTRIBUTING COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the twenty-seven (27) towns served by it was $769,703; that its gross earnings for the year ending June 30th, 1932, were $408,656; that its net earnings after proper adjustments for salary reductions would have been $15,926 or an earning of only 2.1% for all purposes of depreciation and return on the present fair value of its property.

THE ARKANSAS VALLEY GAS COMPANY. That the present fair value of its property used and useful in rendering service to its consumers in the city of Arkansas City, Kansas, was $440,772.00; that its gross earnings for the year ending June 30, 1932, were $190,985.00; that its net earnings after proper adjustments for salary reductions would have been $27,262.00, or an earning of only 6.2% for all purposes of depreciation and return on the present fair value of its property.

ALL DISTRIBUTING COMPANIES. That the present fair value of their properties in the aggregate used and useful in rendering service to their consumers in all of said cities was $15,326,298; that their gross earnings for the year ending June 30th, 1932, were $7,092,398; that their net earnings for the year ending June 30th, 1932, after proper adjustments for salary reductions would have been $756,989 or an earning of only 4.9% for all purposes of depreciation and return on the present fair value of the properties of all said distributing companies.

The Cities Service Gas Company, which furnishes the supply of gas to all the Appellee distributing companies, was not a party to the proceedings had before the Kansas Public Service Commission, the Commission admitting at all times that it had no power, jurisdiction or authority to fix rates to be charged by that company in its interstate business. Nevertheless, the Commission employed expert engineers who undertook to make a valuation of all property belonging to the Cities Service Gas Company, although the greater part of such property was outside the State of Kansas and beyond the jurisdiction of the Commission; and also employed expert accountants who went to the office of the Cities Service Gas Company at Bartlesville, Oklahoma, outside the jurisdiction of the Commission, to audit its books. These engineers and accountants testified before the Commission as to their respective findings.

The several distributing companies, Appellees herein, showed to the Commission that they respectively had been notified by the Cities Service Gas Company that gas could not and would not be furnished to them for less rates than those at the time being charged, and the distributing companies took the position before said

Commission and before the Court below that as none of them at the time was making proper or adequate returns its would be impossible to survive if they were required to pay 40c per thousand cubic feet for gas at their respective city gates, and base their rates to consumers on a price of 30c per thousand cubic feet, and if they were required so to do their property would be confiscated. In order to avoid this situation, the distributing companies undertook to show the reasonableness of their respective contracts and introduced detailed and voluminous evidence as to value of the property of the Cities Service Gas Company and its experience under the existing contract.

As a result of these proceedings, the Commission on July 20, 1932, issued its order (R. 69) directing that the several distributing companies cease to set up on their books as an expense item any payment for gas at the city gate in excess of 29.5 cents per M. C. F., and

> "That on and after the 1st day of August, 1932, the rate to the consumer shall be reduced by the distributing companies in proportion to the reduction in expenses above named, pending a final determination of the distributing company rates. Such reductions to be measured by the ten-cent reduction per M. C. F. and 1¾ per cent of the gross revenue of the distributing companies."

Following the application of the several distributing companies for a rehearing, said Commission set aside the order of July 20, 1932, and on August 31, 1932, issued two orders attached to the several Bills of Complaint herein as Exhibit "L" (R. 59) and Exhibit "M" (R. 62).

Exhibit "L" contains an order in practically the same language as above quoted from the order of July 20, 1932, except that the city gate rate is fixed at 30c instead of 29½c (R. 59).

In Exhibit "M" it was ordered "that effective September 1, 1932, and until a hearing is held and an order issued, that the distributing companies, respondents above named, shall charge rates to the consumers as follows:

"All distributing companies paying a gate rate in excess of 30 cents per M. C. F. shall deduct the difference between what the distributing company is now paying at the city gate and 30 cents per M. C. F. and pass on this difference to the consumer" (R. 62).

In the court below it was admitted by counsel for the Commission that order Exhibit "M" directing the distributing companies to pass on to their respective consumers the difference between the expense of purchasing gas at any rate in excess of 30c per M. C. F. and 30c was invalid, and the Commission consented to a permanent injunction as to that order, so that the order Exhibit "M" is not now in issue herein (R. 282).

It is apparent, however, that the order Exhibit "M" was void for reasons other than those admitted by the Commission. The order undertook to reduce local rates immediately, and then later—we have reason to believe, much later—determine whether such reduction was justified. The fact that the companies might suffer confiscation in the meantime was either ignored or intended. It would seem that the Commission purposely refused to hear evidence as to the local rates intending to immediately put into effect reduced rates, the reasonableness of which it would later consider.

SUMMARY OF ARGUMENT.

1. In the absence of a proceeding the purpose of which was to ascertain the reasonableness of a local rate to consumers, the Commission had no jurisdiction in this proceeding.

2. The issue presented to this court is moot for the reason that in the absence of an inquiry as to proper local rates the question as to what was the value of the property of the Cities Service Gas Company or its earnings as of a past date is merely a matter of curiosity.

If the above propositions are not adopted:

3. The earnings of the Cities Service Gas Company on its last available experience, June 30, 1932, are reasonable on the valuation founded by the Commission, particularly under the statutes of the State of Kansas cited.

4. In determining the reasonableness of the contract under consideration, such determination should be based on present values and present experience, and not on average values and earnings.

5. The findings of the court below as to the value of the property of the Cities Service Gas Company are supported by the overwhelming weight of evidence, and should be increased rather than decreased.

Jurisdiction.

We have made the foregoing preliminary statement in order to enable this court better to understand the issue, if any, now before it for determination.

It was admitted below, and doubtless will be admitted here, that the Commission has no power or jurisdiction

to establish rates to be charged by the Cities Service Gas Company in inter-state commerce. The repeated decisions of this court holding that no such power or jurisdiction exists are set out in the opinion of the court below, and a re-citation of them here is not necessary.

It was also admitted in the court below, and doubtless will be admitted here, that the Kansas Commission was not undertaking in the proceedings had by it to determine reasonable rates to be charged by distributing companies to their respective customers; that no valuation was made by said Commission of any of said distributing company properties, or any investigation made to determine whether or not the rates then being charged by said distributing companies respectively were adequate.

There was no evidence as to any of these matters before the Commission, and in the court below the only evidence was that of the Appellee distributing companies showing the value of their respective properties and their operating experience as alleged in the several Bills of Complaint and as stated in the foregoing Preliminary Statement. This uncontradicted evidence shows that the distributing companies as a whole were, under existing rates, earning only 4.9% for all purposes of depreciation and return on the then fair value of their properties in the aggregate.

The Commission refused to hear any of this evidence as to the value of the properties of the several distributing companies or their operating experience; but, nevertheless, without any knowledge whatever of the situation, undertook by Exhibit "M" to direct that all rates be reduced as of September 1, 1932. (R. 62.)

That both the refusal to hear evidence and the establishment of rates pending future investigation are beyond the power of the Commission was held in the very recent

case of *Rockland Light & Power Company* v. *Milo R. Maltbie et al.*, reported in 148 Miss. 22, and decided by the New York Supreme Court, Albany County, June 9, 1933. In that case the court said:

> "It would appear that by the exclusion of certain testimony and exhibits offered by petitioner the Commission committed prejudicial error in that such excluded testimony and exhibits established prima facie that the said temporary rates prescribed by the Commission would yield a return of less than 4 per cent on the value of petitioner's property used and useful in the public service. The exclusion of this evidence for the reason stated in the decision of the hearing commissioner, which was adopted by the Commission and embodied in its order, in itself, warrants the suspension of the order directing the establishment of temporary rates until the matter may be determined on the merits.
>
> The Commission cannot disregard all rules of procedure and deny to a petitioner the privilege of introducing evidence in a rate case as to the value of its property. In the discharge of its duty a fair hearing is a fundamental requirement, and where rights depend on facts a finding without giving consideration to available material evidence is an arbitrary exercise of power inconsistent with rational justice. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, (1913) 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185."

No order has been issued since August 31, 1932, and no attempt of any kind has been made since that date to change or modify the rates of the distributing companies in any respect.

There is no application or proceeding of any kind pending before said Commission at this time by any city served by any of the Appellee distributing com-

panies or by the Commission on its own motion to determine any of such rates; and no attempt has been or is being made by said Commission to ascertain the value of the property of any of the distributing companies or to determine the reasonableness of their respective earnings under existing rates.

It is our contention that in this proceeding there is no justiciable issue before this Court, and that the only question presented is the right of the Kansas Commission to determine in the manner undertaken by it the moot question as to what a proper city gate rate was as of September 1st, 1931.

As above stated, the reasonableness of said city gate rate has been twice determined in connection with the ascertainment of proper rates to be charged by the Wichita Gas Company to its consumers in the city of Wichita, one determination having been made by the Supreme Court of the State of Kansas in 1928, and the other by the District Court of the United States for the District of Kansas, First Division, in 1930.

In the Western Distributing Company case, this Court held that the determination of a proper city gate rate for the city of Wichita was not even prima facie evidence as to the reasonableness of a rate to be charged at El Dorado, Kansas, some thirty (30) miles distant. The Kansas Commission prevailed in the Western Distributing Company case on the ground that the adjudication of a reasonable gate rate for one city had no bearing on the reasonableness of the gate rate in a city thirty (30) miles distant. It is at least inconsistent on the part of the Commission thereafter to enter upon an extended investigation on its own motion and at the conclusion thereof to establish a uniform gate rate applicable to all cities in Kansas, notwithstanding the fact that gas must be

transported two hundred seventy (270) miles farther to supply some cities than others. Especially is this true when it established this uniform rate without any evidence as to any of the other operating costs of any distributing company, without consideration of the valuation of any distributing company's property or its gross and net income, and in disregard of all other considerations upon which the decision in the Western Distributing Company case was based.

The Commission now contends that 30c is a reasonable rate to be charged at the city gate of every city in Kansas served by the pipe line system, although it contended in the Western Distributing Company case that an adjudication as to the gate rate at Wichita had no bearing on the gate rate at El Dorado.

This proceeding is so unusual that the citation of precedents is impossible. So far as we are aware, no like proceeding has ever been undertaken by any commission anywhere. What the Commission did, was to undertake to determine the value of the property of the Cities Service Gas Company over which it admittedly had no control, and to determine its operating experience and earnings as an abstract proposition unrelated to any inquiry then or since pending before it as to the reasonableness of local rates to be charged by any company. The item of purchased gas is one of the hundreds of items entering into the operating expense of every distributing company selling natural gas. The cost paid for coal or other fuel by any utility manufacturing gas or by any utility manufacturing electric energy is also a major item of expense in the operations of all such utilities. We do not believe, however, that it would be contended that any Commission without having before it some proceeding involving rates to be charged the public would have the

right to establish the price of any such fuel and attempt to hold the several utilities to that price in the future when the question of their rates might be under investigation.

A somewhat similar situation was before the Supreme Court of Missouri in the case of *State ex rel. Columbia Telephone Company* v. *Atkinson et al.*, — Mo. — 195 S. W. 741. In that case the Missouri Commission had before it the question of rates to be charged by the telephone company at Columbia, Missouri. The Commission found for the company so far as rates were concerned, but fixed the value of the company's property at a figure which the company considered unreasonably inadequate. An appeal was taken and the Court held that if rates were not involved, the question as to what the value of the property might be was moot. The Court said:

> "The only purpose of ascertaining the value, as mentioned in the complaint in No. 282, was to find out whether the rates were reasonable and to secure a reduction of rates. While the statute, authorizing the commission to ascertain the value of the property of such companies, stands by itself as a separate provision of the Public Service Commission Act, we cannot see that the Commission would be required, as a mere matter of curiosity independent of any purpose it might serve, to go to the labor and expense of ascertaining the value of any such property. Such action, when taken by the commission, is for some definite purpose; usually for the purpose of fixing rates, although it might be done when the commission has before it for consideration the propriety of allowing the issuance of stocks and bonds, or of any other acts of a corporation over which the commission has supervision."

The same question was again before the Supreme Court of Missouri in the case of *West St. Louis Water & Light Co.* v. *Public Service Commission of State of Missouri,* 197 S. W. 340, the facts and decision of the Court being thus stated in the syllabus:

> "Certain residents of the county where defendant water and light company operates its plant filed with the Public Service Commission complaints as to rates, etc. The Commission proceeded to ascertain the value of appellant's plant, and found that the rates, except in minor details, were not unreasonable. The company brought the matter for review to the circuit court, complaining only of the findings as to valuation. The order of the Commission was upheld, and the case appealed. Held, that the question of valuation was a moot question, and would not be reviewed."

We concede that under the decision of this Court in the case of *Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, the Kansas Commission in determining proper rates to be charged by any of the several distributing companies to their consumers could require a showing as to the reasonableness of the price paid for gas to an affiliated company, the clear purpose of that decision being to enable such a commission to ascertain whether the earnings of the distributing company and the affiliated supply company when considered together and the whole treated for rate making purposes as a common enterprise were unreasonable. That, however, is not this case. The Commission was admittedly not undertaking to fix rates for distributing companies and repeatedly refused to permit any evidence to be introduced as to the value of their properties or their operating

or any other facts (see this brief page 5) upon which an intelligent determination of rates could be based.

The legislature of Kansas by Chapter 239 of the Session Laws of 1931 had this same thought in mind when it enlarged the powers of the State Commission, for the power so granted is expressly limited for use "in ascertaining the reasonableness of a rate or charge to be made by a public utility."

The utter futility of any such proceeding is clearly apparent in view of the present economic experience in the United States. The National Recovery Act has required the Cities Service Gas Company and all the distributing companies to adopt codes, and such codes have been adopted and signed. Operating expenses have been materially increased thereby. This fact does not appear in the record, but as stated by this Court in the case of *Atchison, Topeka & Santa Fe Railroad Company et al.* v. *United States et al.*, 284 U. S. 248:

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country."

It is likewise a matter of common knowledge that the thought and effort of the present administration has been devoted largely to increasing commodity prices, and it is a matter of common knowledge of which this Court may take judicial notice that such prices have materially increased. The property of the Cities Service Gas Company consists largely of pipe, compressor stations and buildings. The commodities out of which these several units have been constructed have all increased and so have labor costs, and to say that they will not further

increase in the future is to say that the efforts of the present administration are to result in failure.

What, then, is the present purpose of determining what the value of the property of the Cities Service Gas Company was as of September 1, 1931, or what its earnings were at that time? There is no rate case pending, and no valuations have been made by the Commission of any distributing company property. It would be not a matter of months but a matter of years to make the required valuations and audits and to properly present the same before the Commission. When that time arrives, if it ever does, of what value then will be the determination of the Commission as to the value of the property of the Cities Service Gas Company and its earnings as of September 1, 1931? If the determination of the reasonableness of the 40c city gate rate at Wichita in 1928 and in May, 1930, was not even prima facie evidence as to the reasonableness of the city gate rate at El Dorado thirty (30) miles from Wichita four (4) months after the decree of the District Court of the United States for the District of Kansas, of what possible value could the determination of the Kansas Commission as to a reasonable gate rate in 1931 be in proceedings which may or may not be brought in future years as to reasonable local ratees to be charged by other and more distant distributing companies?

We have set out in detail in our preliminary statement the separate and aggregate values of the properties of the several distributing companies (as of September, 1931, now much higher), and their several and aggregate earnings. The Commission and the court below have found the value of the property of the Cities Service Gas Company and its earnings. These several facts taken together constitute the "over-all" picture and show conclusively

that when the properties are considered as a whole for rate making purposes, the "over-all" earning is inadequate.

As above stated, we believe this proceeding to be without precedent. We also believe that the Commission in issuing the two orders of August 31st, 1932, was not acting in good faith. From argument made to the court below, we believe its purpose was, to fix a low rate which the distributing companies would be in the future permitted to pay the pipe line company and charge to their respective operating expenses, but to so frame the order that neither the pipe line company nor the distributing companies could say that their property was being confiscated, and so that none could appeal or in any manner invoke the jurisdiction of any court to review the Commission's action. Its intention was, that this order should become final by reason of not being subject to review, and that in future cases, it would be used as a starting point without regard to the then existing conditions. This contention was thus disposed of by the court below:

> "If the construction of counsel for the Commission is correct, the order is plainly an attempt to avoid a judicial review in this court of the matters therein determined, and to deprive the distributing companies of their constitutional rights. This cannot be tolerated."

In the two cases above cited where the 40c city gate rate was found to be reasonable by the Supreme Court of Kansas and the District Court of the United States, the Commission and the respective courts had before them proceedings properly instituted to determine reasonable rates to be charged by the Wichita Gas Company to consumers served by it. In both of these cases, the reason-

ableness of the city gate rate became material solely by reason of the fact that local rates were properly under investigation, and in both of those cases, the Wichita Gas Company recognizing the right of the Commission to such information voluntarily assumed the burden of proving the reasonableness of such city gate rate.

In the Western Distributing Company case the proceeding was again a proper one authorized by statute, being the application of the Western Distribution Company for the determination of reasonable rates to be charged by it to its consumers in the city of El Dorado. In that case, the Commission had its engineers make a valuation of the property used and useful in rendering service to consumers in El Dorado, the company did likewise, and a full showing was made as to all matters necessary to the determination of a reasonable rate to be charged local consumers. As above stated, the Court held the adjudication in those cases was not prima facie evidence for use in determining the rates for any other city; but it certainly did not hold in the Western Distributing Company case, or in any other case, that the Kansas Commission, or any other commission, having before it no inquiry as to rates could determine as an abstract proposition the reasonableness of one item of the operating costs of any public utility, especially when such determination was as to the price of a commodity transported and sold in interstate commerce.

In this proceeding, the Kansas Commission consistently refused to admit any testimony as to the value of the property of the several distributing companies, and consistently refused to listen to any evidence as to their earnings. This attitude was maintained in the court below where the Commission objected to the distributing companies introducing any evidence as to the value of

their respective properties or their operating experience on the ground that the Commission had had no opportunity to investigate any such matters or to value the property of the several distributing companies and on the further ground that such matters were not in issue until the Commission had made an investigation for the purpose of determining the fair value of the properties owned by the distributing companies and their rate of return. It was stipulated in the court below as follows:

> "It is further stipulated that the witness F. C. Hamilton will testify that he is familiar with the value and fianancial experience of the distributing companies, plaintiffs herein, and that the value of their respective properties and their operating experience is as set out in the several bills of complaint of the complainants herein other than the Cities Service Gas Company, to which the Public Service Commission objects on the ground that the testimony is irrelevant, incompetent and immaterial, and further states that it has had no opportunity to investigate this matter or value the property and that it was the intention of the Commission to do so in pursuance of its order set out in plaintiff's bill of complaint of Exhibit 'L.' (R. 371.) (Exhibit 'L' was confessed to be void before this objection was made.)
>
> "It is further stipulated that the witness F. C. Hamilton will testify that if the several distributing companies complainants herein are compelled to pay the price they are now paying the Cities Service Gas Company for gas at their respective city gates and are compelled to base their rates to consumers upon the price fixed by order, Exhibit 'M,' they will not be able to make operating expenses, with nothing for return and depreciation on the value of their property, to which testimony the Commission objects on the ground of incompetency, the subject matter not coming in issue until the Commis-

sion has made an investigation for the purpose of determining the fair value of the properties owned by the distributing companies and their rate of return." (R. 371.)

In the foregoing discussion we have endeavored to point out two propositions in a sense separate but at the same time so related that a discussion of one involves the other. These propositions are:

First, the Commission not having acted "in ascertaining the reasonableness of a rate or charge to be made by a public utility," the proceeding is not authorized by the Kansas statute or the decisions of this Court.

Second, rates to consumers not being involved, the determination of the abstract question as to what was a proper price to pay for gas at the city gate at a given past date without applying such finding in any manner is merely the determination of a moot question.

The above discussion has proceeded on the theory that the Commission, as it repeatedly stated, never intended to ascertain local rates. This theory and these repeated statements are borne out by such actions of the Commission as the joining of companies operating in one hundred thirty-five (135) cities and communities in one proceeding where they could not possibly present separate rate cases; the failure to make valuations, audits or other investigation as to any of the distributing companies; the refusal to permit any of the distributing companies to introduce any evidence as to such matters before it, and the objection to any such evidence in the court below.

Why two orders were issued instead of one on August 31, 1932, we can only surmise. By all proper practice, one order only should have been issued, as was done July 20, 1932, and the two orders should now be con-

sidered as one. They were handed down simultaneously in decision of the same proceeding. The two taken together constitute a finding and a judgment. The judgment has been abandoned and set aside, leaving only the finding. Even if the two orders taken together did concern local rates, the order now in controversy does not. It is not, in fact, an order at all; it is a finding as to a moot question. The only semblance of an order is the direction that the several distributing companies cease to set up on their books any amount paid for purchased gas in excess of 30c, and the further suggestion that they *should* not consider a greater amount in fixing local rates. As to bookkeeping, if the books are to mean anything at all, they must set up an actual transaction, and as to rates, the companies are not fixing them; they are already fixed, and can only be changed by the Commission as provided by law, which law requires not only a full hearing and investigation but an express finding that existing rates are unjust and unreasonable.

The Kansas Commission neither made the required investigation, nor made any finding as to the unreasonableness of existing rates. These failures alone entitled the appellees below to a permanent injunction against the order of the Kansas Commission and all parts of it, as was held by Chief Justice Taft in the case of *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48, from which we quote the following from page 58:

> "The proceeding we are considering is governed by Sec. 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after

> full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such finding the order in this case was void."

In that case there was an order without any finding; in this case there are findings without any order.

In the brief for appellant it is stated, "The Commission assumed jurisdiction under the authority expressed in the recent case of *The Western Distributing Company* v. *The Public Service Commission of Kansas*, 285 U. S. 119." This is rather remarkable as that case was decided February 23, 1932, over seven months after the proceeding of the Kansas Commission was instituted.

Elsewhere in the brief is cited the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133.

We can find nothing in either of these cases supporting this assumed jurisdiction.

In the Western Distributing Company case, the local distributing company was asking an increase in rates. All this Court held in that case was that before being entitled to such relief, the company should have complied with the Commission's demand that a showing be made as to the *cost* of supplying gas at the city gate.

In the Illinois Bell Telephone case, this Court expressly disapproved the exact thing which the Kansas Commission did in the case at bar instead of authorizing it as claimed by the appellant. In that case the court below found the earnings of the Western Electric Company over a period of years, and found them to be reasonable. This Court remanded the case for findings

as to the *cost* of the service rendered the Illinois Bell Telephone Company as distinguished from the cost of all business done by the Western Electric Company.

The Kansas Commission did not find, and made no pretense of finding, the cost of supplying gas at any city gate. It merely found the aggregate earnings of the Cities Service Gas Company from all classes of business, industrial (not regulated) and domestic, and in Missouri, Oklahoma, and Texas as well as Kansas. There is certainly nothing in either the Western Distributing Company or the Illinois Bell Telephone Company cases authorizing any such thing, and the authority granted by the Kansas statute is expressly limited to the ascertainment of "actual cost."

The court below clearly had jurisdiction in the several suits brought by the appellees herein, for it had before it a complete order in two parts, one part finding a rate, the other applying the finding to local rates. The orders taken together require the distributing companies to put in effect rates to local consumers based on a price for purchased gas 10c a thousand cubic feet less than the price for which it could be purchased. These local rates were put into effect by the Commission without any investigation whatever as to local conditions and after refusing the distributing companies opportunity to be heard with respect to them. The undisputed evidence in the court below, as shown by the stipulation above quoted, was, that such rates would not permit the distributing companies to earn even their operating expenses, and they were clearly confiscatory. (R. 371.) Therefore, the court below had jurisdiction. This jurisdiction was admitted by the Commission when it confessed the invalidity of the order establishing local rates and consented to a

permanent injunction as to it. This confessed injunction should have ended the litigation and carried with it a permanent injunction as to all other parts of the order whether contained in one instrument or in two.

The situation here presented is somewhat similar to that in the case of *United States* v. *Los Angeles R. R.*, 273 U. S. 299, where the Interstate Commerce Commission made a final report on value (called an order) but made no order respecting rates. Suit was brought to enjoin and annul this order, but this court held that the order differed essentially from all those held by the court to be subject to judicial review, and said:

> "Each of the orders so reviewed was an exercise either of the *quasi*-judicial function of determining controversies or of the delegated legislative function of rate making and rule making. The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later."

So here, what remained of the orders of August 31, 1932, after that part of the order fixing rates was confessed to be void, became nothing more than a voluntary and unauthorized excursion of the Commission into intercompany contracts which might very properly be a part of a rate proceeding, but should not be used as a means of precluding inquiry into the same evidence whenever such a rate hearing might be had.

Upon the confession made by counsel that the order, (Exhibit "M," R. 62) was void the court below should have entered a permanent injunction without hearing any evidence in the case, because the remaining issues were moot.

Even though we may be carrying this argument to the extent of being tedious, we again insist that there is nothing in either the Western Distributing Company or the Illinois Bell Telephone Company case which authorizes the Kansas Commission to attempt indirectly to fix a gate rate for the Cities Service Gas Company to be applied to its inter-state business. This is exactly what the Commission undertook to do. It did not confine its investigation to Kansas or even pretend to ascertain the cost to the Cities Service Gas Company of supplying gas to the city gate of any city in Kansas; but on the contrary, undertook to investigate its operations as a whole in every state in which it does business, and including all kinds of business transacted by it. The Kansas investigation concerned only domestic rates in Kansas. That investigation did not and could not have had anything to do with any other kind of business or with the business in any other state. So far as appears from the record and so far as any facts were developed by the said investigation, the domestic business in Kansas

may have been carried on by the Cities Service Gas Company at an actual loss. The record does show that the company's industrial business was greater in extent so far as the amount of gas sold was concerned than its domestic business. And the investigation also disclosed that the greater part of the business of the company as a whole was done outside of the state of Kansas. If the Kansas procedure was proper and authorized by the decisions of this Court as claimed, so would a like procedure be proper in Missouri, Oklahoma, or Texas. The confusion which would result from any such independent investigations by independent commissions is readily apparent. It cannot be assumed that any of the other states would find the same values or that they would come to the same conclusion as to the earnings of the company, especially if such other commissions should consider their investigation as limited to gas sold for domestic purposes instead of to all business transacted by the company, or should limit their investigation to a determination of the earnings of the company from domestic business in their particular state.

We submit that the proceeding had before the Kansas Commission was not authorized by statute or by the decisions of this Court; that all parts of the two orders should have been permanently enjoined, and that the decree of the court below should be affirmed for the reasons stated.

Jurisdiction on the Admitted Facts.

In our previous discussion we have endeavored to show that the Kansas Commission had no authority under statute or decision to undertake the investigation which it did undertake. Under this heading it is our purpose

to show that said Commission, on the facts found by it, and assuming for the purpose of argument that such findings are correct, had no authority to enter the order which it did enter, if any part of said order is now the subject of adjudication.

The value of the property of the Cities Service Gas Company as found by the Commission was $73,170,510.00 as of September 1, 1931. (R. 53.)

In its brief at page 147, appellant admits that this figure is not correct, due to the fact that the Commission depreciated overheads but made no allowance in annual reserves to take care of such depreciation. The amount which appellant admits should be added to the Commission's valuation is $1,011,392.00, which makes the value of the property as of September 1, 1931, $74,181,902.00.

Assuming for the purpose of argument that this finding of value is correct, it is our contention that if it was proper for the Kansas Commission to investigate the over all earnings of the Cities Service Gas Company from all classes of business in all states in which it transacts business, that even in such event the earnings found by the Commission for the last available period were reasonable earnings on the valuation so found and that the Commission and the court below should have so found and eliminated from the present consideration the necessity of a detailed and laborious examination of the correctness of the Commission's findings as to value.

The Commission found the earnings of the Cities Service Gas Company for the year ending June 30, 1932, to be $7,963,813; that replacement reserves for said period should be $1,977,591; and that the net income of the company after reserves applicable to return on the value of said property was $5,986,222. (R. 55.) This earning is a return of 8.07 per cent on the value of the

property of the Cities Service Gas Company as above recited.

In arriving at the above earnings, the Commission disallowed an item of operating expense amounting to $52,297.13 representing payments made to Henry L. Doherty & Company by the Cities Service Gas Company under the one and three-quarters per cent contract, and $50,000.00 charged as expense to amortize the cost of the proceeding before the Commission. It is contended by appellees that these deductions should not have been made for the reason that the Commission has no power of regulation over the inter-state business of the Cities Service Gas Company, and no power to disapprove the contract between it and Henry L. Doherty & Company. If this Court finds these deductions should not have been made, the net earnings of the Cities Service Gas Company become $7,861,516.00, and the net income after admitted reserves becomes $5,883,925.00 or 7.93 per cent of the value as found by the Commission.

We do not desire to be understood as agreeing to the figure of $5,883,925 as representing the actual or correct net income of the Cities Service Gas Company for the year ending June 30, 1932. In arriving at that net figure, the Commission made its own arbitrary allowances for depreciation, depletion, amortization, and dry hole expense in the sum of $1,977,591, which appellees contend is entirely inadequate. These allowances were made on average requirements over a period of years and had nothing whatever to do with the then situation or with the future. We are merely assuming these figures as correct for the purpose of argument, and are referring to them as facts admitted by the Commission.

On these admitted facts, the question is presented to this Court as to whether an earning of seven one-

hundredths of one per cent over 8 per cent is such an earning as can in any sense be considered unreasonable in view of the hazardous business in which the pipe line company is engaged.

The court below in discussing the jurisdiction of the Commission approached the subject from two angles. The first view expressed was, that the distributing companies and the pipe line company were, in effect, one common enterprise, and that *in determining local rates,* the Commission had the right to determine a reasonable return to the Cities Service Gas Company for producing, transporting and delivering gas at the respective city gates of the cities served. The second view expressed was, that if the Commission had authority only to scrutinize and inquire into the reasonableness of contracts between affiliated companies, the same result would necessarily follow and that the only way in which the reasonableness of such contracts could be determined was to ascertain the reasonableness of the return to the Cities Service Gas Company on its property used and useful in its business. (R. 286.)

It is our contention that a return of either 8.07 per cent or 7.93 per cent is reasonable.

We do not believe there is a better definition as to what constitutes a reasonable rate than that given by the court below in its supplemental opinion. This definition is as follows:

> "A 'reasonable rate' is not a particular decimal. A 'reasonable rate' is one that falls within the zone of reason; it is a field and not a mathematical point. The lower limit of the zone of reason is confiscation, that is, denial of a net return sufficient to preserve property and attract capital necessary to enable the utility to discharge its public duties. A finding that

> a particular rate is reasonable is not, therefore, a finding that every other rate is either unreasonable or confiscatory." (R. 320.)

As we understand the decision in the Western Distributing Company case, the appellees herein would not be required in any proper proceeding before the Kansas Commission to make any showing as to the reasonableness of the price paid by them for gas purchased if such purchase was from a company not affiliated with them. The sole and only reason for the requirement of such showing is, that the companies are affiliated. In the Western Distributing Company case, this Court said:

> "It is enough to say that, in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence, which would not be required in the case of parties dealing at arms' length and in the general and open market, subject to the usual safeguards of bargaining and competition."

If a reasonable rate is a zone and not a decimal point, and if the only reason for requiring a showing as to the reasonableness of such rate is the fact of affiliation, the question as we look at it then becomes a question of whether or not a court can say as a matter of law that a return of 8.07 per cent or a return of 7.93 per cent is without the zone of reason and such a rate of return as unaffiliated companies dealing at arms' length would not countenance.

If such a rate of return is within the zone of reason and such as an unaffiliated company engaged in the hazardous business of producing and transporting gas should reasonably expect, then there is no need of further discussion of the issue, if any, now presented.

In the court below all of the witnesses for appellees testified that 8 per cent was a minimum reasonable rate of return; and the only witness for the Commission (who qualified only by reason of being a former member thereof) testified that in normal times 8 per cent would be a proper rate of return, but that present times were abnormal, meaning thereby that capital under existing conditions could not be procured for an enterprise limited to such a rate of return.

The court below found in its finding number XVIII that 8 per cent was not unreasonable, such finding being as follows:

> "A return of approximately 8 per cent upon present values is necessary, under present conditions, to assure confidence in the financial soundness of the Cities Service Gas Company, to maintain its credit, and to enable it to raise money necessary for the discharge of its public duties. Any return substantially lower than that would be confiscatory. *United Railways* v. *West*, 280 U. S. 234, 252.
>
> *Rate of Return.* The pipe line company is subject to the hazards attendant upon the production of gas, and its transportation to distant markets. The amount of gas it may take from its own wells, and the price it may charge for its product, is subject to regulation by public authority. It must find a market in a highly competitive field. It competes with coal and fuel oil in household heating and for industrial purposes; the competition of fuel oil is particularly formidable for house-

hold heating; improved oil burners are automatic, approved by the National Board of Fire Underwriters for safety, are as clean as gas, and dependable. Electricity has absorbed the household lighting and is making serious inroads on cooking. In short, it must search for and find its gas; transport it hundreds of miles without an hour's interruption; then find and satisfy its customers. The law contemplates that it make no more than a fair return in good times; it should not be forced to take less when times are hard. There is evidence that in years past the profits of the company exceeded 10 per cent. We do not analyze those figures; in rate making, the past must bury its dead; a confiscatory rate cannot be ordered for the future because an exorbitant profit was made in the past. *Georgia Ry.* v. *R. R. Comm.*, 262 U. S. 625, 632; *Board of Commrs.* v. *N. Y. Tel. Co.*, 271 U. S. 23, 32.

What is a proper return is a question of fact in which the elements of time and place play an important part. In this part of the Middle West, it is a recognized fact that in normal times, public utilities must promise a return of approximately 8 per cent, if capital for construction and extensions is to be attracted from other investments. The Kansas statutes recognize 8 per cent as a minimum return for a waterworks property (Sec. 13-1201, R. S. Kan. 1923) and provide for a recapture of a portion of the earnings over 10 per cent of gas and electric companies (Sec. 13-1204, *id.*). The Kansas Supreme Court has held that earnings from 8 to 9 per cent on telephone properties are reasonable. *The State ex rel.* v. *Telephone Co.*, 115 Kan. 236. The witness for the Commission testified that 8 per cent would not be an unreasonable return in normal times, but testified that these times are abnormal, as they are. But if abnormality is considered, the return must be increased, not decreased. In these times, when stock of the best

utilities can be purchased on a 9 per cent basis or better, certainly an 8 per cent return on this hazardous enterprise is not unreasonable." (R. 317.)

The evidence upon which the above finding of the Court was based was that of F. C. Hamilton, a member of the executive committee of Henry L. Doherty & Company and in charge of the rate and valuation department of that company; P. McDonald Biddison, a gas engineer of national reputation, who testified that he had had many years' experience in financing gas properties; and Charles F. Clark, associated with Halsey, Stuart & Company of Chicago, who testified that he had spent practically his entire business life in intimate touch with financial operations of the largest industries of the United States. All of these witnesses testified that under existing economic conditions a fair return should be in excess of 8 per cent, that neither at this time nor in the immediate future could it be hoped that capital could be attracted to a project such as that of the Cities Service Gas Company for a return of 8 per cent, but that a much greater return would be required if capital could be interested at all. (R. 528.)

The only evidence for the Commission was that of C. H. Montgomery, an expert accountant employed by the Commission and a former member thereof, who testified as follows:

"Q. You stated in your judgment 8 per cent was the amount in normal times that would interest capital? A. A maximum of 8 per cent in normal times.

Q. Are times very abnormal now? A. They are, very, at this time.

Q. Do you think you could interest capital in a project of this sort at 10 per cent now? A. It might

be difficult to interest capital under any conditions right at this time.

Q. Wouldn't you say, then, that under present conditions 8 per cent would be the minimum? A. If this project was being initiated at this time, it would be difficult. If such a proposition would be initiated under these conditions, it would be difficult to secure capital at a reasonable amount, if it was contemplated that these conditions would continue for an indefinite length of time.

Q. Well, suppose we are reproducing this property as of September 1, 1931. Was the condition at that time any different than what it is now? Was the condition any different on September 1st, the date we have chosen for this reproduction, than it is now? A. That would depend. Any change in condition probably has been for the worse.

Q. These financial experts have been seeing rainbows in the sky, have they not? A. They are still seeing them in the future, but conditions have probably become worse since September 1st.

Q. Well, what do you say? Is 8 per cent as of September 1, 1931, an unreasonable rate of return? A. If it was contemplated that those conditions would last indefinitely and if in view of those conditions anyone would have the courage to go out and embark on such an enterprise, they would probably expect to receive a higher rate than 8 per cent. * * *"

The Kansas Supreme Court in the case of *The Wichita Gas Company* v. *Public Service Commission,* 126 K. 220, 268 P. 111, in construing the Kansas public utility law and the authority of the Kansas Commission held that the question of a proper rate of return was a question of fact to be determined according to the evidence adduced, and said:

"The proposed question is one of fact, to be determined according to those standards by consideration of evidence duly produced at the trial of the issue. The evidence will include estimates and opinion evidence, and will involve an element of prophecy; but the finding of the court in a rate review case, based on the evidence, of fair compensation for public utility service, is a finding of fact. To the extent a rate does not fairly compensate the utility for its service, it is unjust, unreasonable, and unlawful, within the meaning of the Public Utilities Act (Rev. St. 1923, 66-101 to 66-195). A rate may also be confiscatory, and hence unlawful, on constitutional grounds. But a rate may be enjoined as unjust and unreasonable which is not so low as to be confiscatory of property. *Railroad Co.* v. *Utilities Commission*, 95 Kan. 604, 148 P. 667. The finding of the referee was that 8 per cent was not merely a fair return, but was necessary for a fair return."

The finding of the court below as set out in finding number XVIII above quoted is the only finding that could have been made on the evidence adduced before the Commission and the court; and if a proper rate of return is to be determined on the evidence, such finding should not be disputed.

If, then, 8 per cent on the undisputed evidence is a reasonable rate of return, does it follow that a return of 8.07 per cent or 7.93 per cent is beyond the zone? If a variation of seven one-hundredths of a per cent is sufficient to take a rate out of the zone of reasonableness, then certainly reasonableness means but a decimal point and not a zone; and if 8 per cent is the minimum reasonable rate, as all witnesses testified and as the court below found, then, clearly, 7.93 per cent is reasonable, and the court below should have found for the plaintiffs

and should have permanently enjoined the orders of the Commission without concerning itself further with the Commission's valuation, and this court should now on the admitted facts affirm the lower court without further examination of the valuation.

In the foregoing discussion as to what constitutes a reasonable rate of return, we have considered the matter from the viewpoint of testimony of witnesses before the Commission and general legal principles which should be applicable to a proceeding such as this. If, however, there remains any doubt, such doubt should be overcome by the Kansas statutes which clearly express the views of the Legislature as to what constitutes a reasonable return, and prohibit certain cities from fixing rates to be charged by a gas utility which will not produce an earning of *at least 8 per cent.* We quote the following from Chapter 14, Article 17, being Section 14-1701 of the Revised Statutes of Kansas 1923:

> "The board of commissioners of any such city, at all times during the existence of such contract, grant, privilege or franchise, shall have the right by ordinance to fix a reasonable schedule of maximum rates, and to make reasonable changes therein from time to time, to be charged such city and the inhabitants thereof for gas, light and heat, electric light, power or heat, or steam heat, and the rates of fare on any street railway, and the rates of any telephone company, or the rates charged any such city or the inhabitants thereof by any person, firm or corporation operating under any other franchise under this act; and the board of commissioners, under the provisions of this act, shall have the right to change or modify any such schedule of rates, after giving due notice and granting a hearing to the interested parties of their intention so to do: *Provided further, however,* that said boards of commissioners

shall at no time fix a rate which shall prohibit such person, firm or corporation from earning at least eight per cent on the amount of its actual cash investment in such city over and above its reasonable operating expenses and the expense for maintenance and taxes."

It will be observed from the language of this statute that it was not the intention of the Legislature to limit the rate to 8 per cent and its sole purpose is to prohibit cities from establishing a rate which will not produce *at least* that rate of return.

The above quotation is from the section of the statute applying to cities of the second class. The statute with respect to cities of the first class is even more favorable to appellees and clearly shows the intention of the Legislature to permit utilities operating in cities of the first class to earn a return of *at least 10 per cent.* Section 13-1204 of the statutes contains provisions with respect to the consideration which a city of the first class is to receive for franchises granted, and gives such city the right to fix rates to be charged by utilities supplying gas and electricity and contains this provision:

> "*Provided, however,* that said governing body shall at no time fix a rate which will prohibit such person, company or corporation from earning at least 10 per cent on its capital invested in such city over and above its reasonable operating expenses and the expenses for maintenance and taxes."

There has never at any time during the course of this proceeding been any evidence presented to the Commission or to the court below which indicated that under present rates the Cities Service Gas Company was earning either 8 or 10 per cent on its invested capital or on

the present value of its property. And on the admitted facts as herein set out, the order of the Commission should have been enjoined by the court below and the decision of that court should now be affirmed.

The Supreme Court of Kansas in the case of *The Wichita Gas Company* v. *Public Service Commission*, 126 K. 220, 268 Pac. 111, and the United States District Court for the District of Kansas in the case of *Wichita Gas Company* v. *Public Service Commission*, 2 Fed. Supp. 792, have each held that an 8 per cent return was proper for a gas distribution system with respect to which there was no element of mining hazard, such as we have herein pointed out as existing in the case of a company engaged in the production and transportation of natural gas.

Considering the nature of this investigation, the fact that the rates to local consumers were not involved, and that the only purpose was to determine the reasonableness of an existing contract which could not possibly have been investigated except for the fact that the companies were affiliated, can this Court now say as a matter of law on assumptions most unfavorable to Appellees and not agreed to by them, but which are admitted by appellant, that an earning of 8.07 per cent or 7.93 per cent is without the zone of reason, and such a rate of return as indicates the parties were not dealing at arms' length because of their affiliation?

We submit that on the valuation found by the Commission and the earnings as found by it the contract under consideration is reasonable, that the Commission and the court below should have so found, and that the Commission was without jurisdiction or power to direct the distributing companies to set up on their books any different price for gas purchased or to attempt to change existing rates on the ground of any claimed unreasonableness.

Commission's Finding of Value and Commission's Finding of Net Earnings.

In arriving at its conclusions, the Commission undertook to average earnings and average replacement reserve requirements over the annual periods ending December 31, 1930, June 30, 1931, and June 30, 1932. We insist that it is not proper to average earnings and replacement reserves as was done by the Commission (R. 164 and Com. Br. 186), and have at page 141 of this brief set out the reasons why the procedure used by the Commission is improper. Assuming for the purposes of this argument, but not admitting, that it is proper to average earnings and average replacement reserve requirements, it is our contention that even then the percentage of earning is not such as is unreasonable or such as indicates any advantage having been taken by reason of affiliation, or the contract is such as would not have been entered into by parties dealing at arms' length.

By averaging earnings and averaging replacement reserve requirements, the Commission arrived at average earnings of $8,559,669.40 (appellant's brief p. 194), from which it deducted average replacement reserves, $1,850,086.54, of which we also complain, and arrived at the figure of $6,709,582.86, which, if applied to the value of the property as of September 1, 1931, now admitted to be $74,181,902, shows a return of 9.045 per cent. In arriving at the net figure of $6,709,582.86, the Commission eliminated all payments made to Henry L. Doherty & Company under its contract requiring the payment of one and three-quarters per cent of its gross income for services rendered, and an item of $50,000.00 rate expense on account of amortizing over a period of years the expense of the proceeding before the Commission. These two items represent payments actually made by the company as appear-

ing on the books of the company, and it is our contention that they should not have been eliminated for the reason that the Commission has no power of regulation of the inter-state business of the Cities Service Gas Company, and any such elimination of its actual expenses in effect amounts to regulation. If these items are proper items of operating expense and are taken into consideration, the net earnings of the company available for return become $6,627,515.69, which is a return of 8.93 per cent on the admitted valuation.

It is our contention that the proceeding before the Kansas Commission was in no sense a rate case in which the Commission was proceeding under any lawful authority to regulate the rates of a company engaged in inter-state commerce where the inquiry would place upon the company the burden of proving confiscation, but was merely a proceeding, whether authorized or not, in which the Commission was undertaking to find out if the earnings of the Cities Service Gas Company were unreasonable to such an extent as to indicate the parties were not dealing at arms' length by reason of their affiliation. For the purposes of this argument, and assuming all facts to the greatest disadvantage to the Appellees, we submit that an earning of 8.93 per cent or an earning of 9.045 per cent are not such earnings as to permit the action taken by the Commission.

Application of Commission's Order, Commission's Finding of Value and Earnings as of June 30, 1932.

It was stipulated by the parties in the court below that if the city-gate rate of 30 cents per thousand cubic feet, as prescribed in the Commission's orders, were applied to the business of the Cities Service Gas Company

for the year ending June 30, 1932, the result would have been a decrease in earnings in the sum of $1,926,145.07 (R. 373). The net earnings of the Cities Service Gas Company for the year ending June 30, 1932, were $7,861,516.85 (R. 515). After disallowance from operating expenses of all sums paid to Henry L. Doherty & Company under the one and three-quarters per cent contract, and disallowance of the $50,000.00 rate expenses, deducting the amount agreed upon, $1,926,145.07, leaves a net income of $6,037,668.91 before replacement reserves.

The reserve allowance as found by the Commission for the year 1932 was $1,977,592, which deducted, leaves net earnings for return of $4,060,077, or a return of 5.47 per cent on the admitted value of the property. This same calculation is arrived at by Appellant in its brief, page 190. In this calculation, we have assumed that it is proper, as we contend, to determine the reasonableness of the Cities Service Gas Company contract on the experience of that company as of the date of the hearing. We have accordingly used its earnings for the last available period, the year ending June 30, 1932, and have, for the purposes of argument, accepted the Commission's unreasonably low allowance for depreciation reserves, and have assumed that the Commission was right in eliminating from the operating expenses of the company payments made to Henry L. Doherty & Company and charge made to amortize the cost of the proceeding over a period of years. On these assumptions, the earnings under the Commission's orders would constitute a return of only 5.47 per cent, which we contend is confiscatory. *United Railway & Electric Company of Baltimore* v. *West,* 280 U. S. 234.

It was the evident intention of the Commission to allow the Cities Service Gas Company earnings in excess of 7 per cent, as the Commission states in its order (R. 56)

the rates prescribed "should result in the company returning more than 7 per cent on the valuation fixed by the Commission." It was impossible for the Commission to compute such an earning on the value of the property as found by it, and in order to accomplish its purpose it resorted to the expedient of averaging values over a period of years. By this procedure, an average value of $69,724,610 was found (appellant's brief p. 194), and the average earnings were applied to this average value. We contend that it is improper and unheard-of to use average values, average earnings, and average depreciation requirements even in a rate case, and it is certainly improper and unheard-of to determine the present reasonableness of a contract on such averages. Even in normal times such procedure should not be followed, and the reasons for not doing so in abnormal times are much more readily apparent. If it is proper for the Commission to go back one or two or three years and consider earnings, there is no reason why such investigation should not antedate the depression period entirely and undertake to estimate present earnings by experience had in years of prosperity. The earnings which we have used in our argument under this heading were the actual earnings for the year ending June 30, 1932, the last available period. Since that time business conditions have failed to improve, and have steadily grown worse; operating costs under the NRA have steadily increased, and the value of the properties of the Cities Service Gas Company, as well as the properties of all the distributing companies have greatly increased, due to necessary extensions and due to higher price levels of both labor and commodities.

We submit that it is proper for this court in determining the reasonableness of the contract in question, if it is held to be an issue before this court, to do so on the

basis of the value of the property of the Cities Service Gas Company at the time the hearing was held by the Kansas Commission and the operating experience of the Cities Service Gas Company as shown by the last available figures presented at that hearing and not disputed, and if so, this court should affirm the decision of the court below on the admitted applicable facts without further examination of the record.

In the foregoing discussion we have applied the earnings of the Cities Service Gas Company to the value of its property for the purpose of showing the rate of return, and that such rate of return was reasonable. In its consideration of a reasonable rate of return, the court must bear in mind that there is a certain fundamental difference between the hazards in a natural gas utility and those in any other utility. An electric plant, for instance, can extend its facilities for the production of current at will, and can do so without making obsolete its transmission or distribution lines. A natural gas pipe line, however, must lay pipe lines, and only after they are laid can it be demonstrated whether the geological predictions as to the quantity of gas underground are, or are not, correct. Any disappearance of the gas supply in a particular field may be replaced by securing another supply from another field. But the disappearance from the first field makes valueless the transmission lines from that field. In other words, the natural gas business has a mining hazard attached to it, and to all of the money invested therein, that is not present in any other utility service. This emphasizes the time and expenditures that naturally are made by geological and supervisory forces in the choice of gas leases. The court below well expressed this idea when it said in its opinion,

> "Upon this five and a half million investment (in leases) depends the entire value of $75,000,000.00 in pipe lines, and many more millions in the properties of affiliated distributing companies."

The mining hazard above referred to is not only the hazard of the fields to which existing lines are connected becoming exhausted, but is also the hazard of closer fields being discovered which would make valueless the millions invested in reaching distant fields. As we have hereinbefore stated, the principal markets of the Cities Service Gas Company are the cities of Kansas City, Missouri, and Kansas City, Kansas. These cities are now supplied by a pipe line extending many hundreds of miles to the Amarillo gas field. Should a field similar to that at Amarillo be discovered in the immediate vicinity of this market, as has repeatedly occurred in the past, the many millions of dollars invested in the line to Texas will have to be forgotten.

Additions Which Should Be Made on Account of Failure to Apply Overheads to Lease Values.

A serious oversight was made by all engineers, attorneys, the Commission and the court below on account of the failure of all concerned to apply certain agreed overhead percentages to lease values. This oversight doubtless arose by reason of the fact that leases were computed separately and not included in valuations except by the addition of a lump sum.

It was agreed by the parties in the court below that 5 per cent was a proper percentage to be used in computing an allowance for engineering and superintendence during construction (R. 308, 375, 376, 377), and that 2.25 per cent was a proper percentage to be used in computing pre-

liminary and organization expense, administration and legal expense, and miscellaneous construction expenditures. (R. 308, 375, 376, 377.) The total of the overheads above enumerated is 7.25 per cent; and we now contend that this percentage should be computed on the proper value of the leases of the Cities Service Gas Company and added to the valuations found by the Commission and by the court below in order to correctly ascertain the values intended to be found by said Commission and said court respectively.

In addition to the application of the above percentages to the value of leases and the addition of the resulting figure to the respective values, a similar allowance should be made for the item of interest during construction. This application, however, is not that of an agreed percentage, as Hamilton, in valuing the property for the appellees used 8 per cent and Black, as engineer for the appellant, used 6 per cent as a proper allowance. Under subsequent heading, we have discussed in detail the question as to whether 8 per cent or 6 per cent should be used but in either event it is apparent that whatever per cent is determined to be proper should be applied to lease values and added to the valuation.

These overheads were computed by the Commission and by the court below on right of way for the full two-year period, it being apparent that the right of way would have to be purchased before the lines could be built. It is even more apparent that no right of way could be purchased until after leases were acquired sufficient for the requirements of the system, as otherwise, the location of the lines could not be established. If this property were to be reconstructed at this time with no property whatever in existence, the first thing to be done would be to acquire an adequate gas supply. Right of way would then be purchased to this supply and the lines laid. There is

therefore no reason whatever for not applying these overheads to gas leases. The Commission found the value of leases to be $2,874,390.00 (R. 311). Assuming for the purpose of argument that this value is correct as representing the value of the leases, there should be added to the Commission's valuation on account thereof 5 per cent as representing engineering and superintendence during construction, and 2.25 per cent representing the three items of preliminary and organization expense, administration and legal expense, and miscellaneous construction expenditures. And assuming that the Commission's adoption of 6 per cent for interest during construction is correct, there should be added an additional 12 per cent representing 6 per cent interest for the two-year construction period. These items on the Commission's own theory of their proper computation amount to $553,320.00, which increases the Commission's value of $74,181,902,00 to $74,735,222.00, and the court's value of $82,380,583.00 to $82,933,903.00.

Under the preceding heading, "Jurisdiction on the Admitted Facts," we have applied the net earnings of the Cities Service Gas Company for the year ending June 30, 1932, as found by the Commission to a value of $74,181,902,00, showing that the Cities Service Gas Company on the basis of its most recent experience was earning 8.07 per cent on the Commission's valuation, and further that if certain items were included in its operating expenses which were disallowed by the Commission, its rate of return was 7.93 per cent. Having shown that the value of the property of the Cities Service Gas Company which the Commisison intended to find was $74,735,222.00, the percentage of 8.07 per cent becomes 8.01 and the percentage of 7.93 per cent becomes 7.87, which changes make the reasonableness of the pres-

ent charges of the Cities Service Gas Company even more clear and apparent.

Under the foregoing sub-heading, "Commission's Finding of Value and Commission's Finding of Net Earnings," we have shown that using average earnings and average replacement reserves as found by the Commission and applying the resulting net earnings to a valuation of $74,181,902.00, the rate of return would be 9.045 per cent. If no eliminations had been made from operating expenses, it would have been 8.93 per cent. With the rate base increased to $74,735,222.00, these respective percentages become 8.98 and 8.87. And we again most earnestly insist that neither of such percentages constitutes an unreasonable rate of return or indicates that the present contract is unreasonable or was entered into by parties not dealing at arms' length by reason of their affiliation.

Under the preceding sub-heading, "Application of Commission's Order, Commisison's Finding of Value and Earnings as of June 30, 1932," we have shown that the application of the rates set out in the Commission's orders to the business of the Cities Service Gas Company for the last available period would produce a return of only 5.47 per cent. If the rate base is corrected for the reasons and in the manner above set out, this rate of return becomes 5.43 and is even more clearly confiscatory.

Findings of the Court Below.

As required by Rule 70½ of the Rules of Practice for the Courts of Equity of the United States, the court below made complete findings of fact and conclusions of law which were duly filed in the case. No exceptions were filed by any of the parties to these findings or

any of them, nor were any additional findings suggested by any party, and no hearing was ever requested or held for the purpose of calling to the attention of the court below any inaccuracies in the findings or conclusions as filed by the court.

When the final decree was prepared, the parties saved exceptions to certain findings as are stated in the decree, and the decree recites that such exceptions were allowed, and this notwithstanding the fact that Rule 71 of the above rules provides that nothing shall be contained in the decree other than the decree or order itself.

We call the court's attention to what was actually done in this respect so that the court may determine whether any of the parties have properly brought up for review any matters other than the findings and conclusions made and filed by the court below.

The Valuation.

Beginning with pages 31-36 of the brief for appellant several pages are devoted to an attempt to appreciate the testimony of E. B. Black, and to depreciate the testimony of F. C. Hamilton, these witnesses being respectively the engineers for the Commission and for the appellees. It is inferred that the valuation made by Black was much more complete than that made by Hamilton, and that it should therefore be given greater weight.

We had not intended to make any comments as to the relative value of the work done by these two engineers; but under the circumstances, feel required to make an answer to the statements made by counsel for the appellant.

In the first place, it is admitted that the work done by Black consisted largely of pricing out an inventory of

the property of the Cities Service Gas Company made by Hamilton and his corps of engineers and in checking maps and records furnished by them. It seems to us rather far fetched for counsel for appellant to contend that engineers who went over the whole system of the Cities Service Gas Company, inventoried every foot of pipe and every gate, valve and fitting in it, together with every building and its contents, and who prepared and furnished to Black maps showing the system as it actually existed, together with the number of miles, size and weight of the pipe and other appliances, should have made a less detailed study than the man who merely took the inventory, maps and records prepared by another and priced them out and checked them for accuracy. The work done in preparing the inventory alone required more time, study and work than was done by Mr. Black and his entire corps of engineers, and of necessity required a much more detailed knowledge of the system than anyone could possibly obtain from merely examining such inventory or such other maps and records. As to the buildings, it is stated that detailed plans were furnished by the company and were checked by Black. If Hamilton's engineers made a sufficient study of these buildings to make plans to be used by Black in his estimates, certainly it cannot be said that their knowledge and information was less than that possessed by Black who merely checked what they had done.

It seems strange to us that in order to appreciate the findings of Black and depreciate those of Hamilton, counsel for the appellant should take three or four items on which there is no contention before this court, and therefore no abstracting of evidence, and in several of which there was no contention before the trial court. One of these items was account No. 1310 where the de-

preciated value found by Hamilton was $37,194.00, while Black's figure was $35,909.00, the difference being only $1,285.00. In order to save time and expense, appellees in the court below waived this difference with the statement, "The difference between the amount claimed by Hamilton and the amount claimed by the Commission is not sufficient to warrant discussion." The court, of course, adopted the Commission's valuation on our waiver.

Another reference is to account No. 1311 where Hamilton's valuation was $50,162.00 and Black's $47,876.00, a difference of $2,086.00. Here again the Commission's figure was adopted by the lower court, as in our brief below, we state, "The difference between the amount claimed and the amount allowed is not sufficient to warrant discussion."

Attention is called to account No. 1315 where Hamilton's depreciated valuation was $385,746.00 and Black's depreciated valuation $265,746.00, the difference being $120,000.00. The court adopted the Commission's valuation, and we are not appealing from its finding.

There is nothing in the findings of the respective engineers to which counsel for appellant call attention which can in any fair manner be used as the basis of an argument that Black was more competent or more painstaking than Hamilton.

Another contention made is that the Commission had an opportunity to observe the respective engineers on the stand, and therefore were in a better position to judge the weight to be given to their testimony than was the court below. We contend that this argument is also unfair. In the court below a transcript of the testimony taken before the Commission was offered in bulk to the court without reading the same or producing the witnesses for examination. This was to save time and ex-

pense. It was not contemplated that oral testimony would have more weight or that counsel would contend as they now do. Had such contention been anticipated, appellees would have produced the witnesses and gone through all of the testimony before the court, notwithstanding the great expense and inconvenience to all parties.

If an argument that Black was more competent or careful or better informed can be based on the three or four uncontested items to which counsel for appellant have called attention, certainly an argument to the contrary can be based upon the findings made by the Commission itself in its opinion of July 20, 1932, wherein Black's figures for well equipment are increased by many thousands of dollars, due to the fact he equipped his wells with line pipe instead of casing and tubing, as is the recognized practice; that he applied the same price to plain end pipe and threaded and coupled pipe; that he entirely overlooked spare parts in compressor stations which the Commission was compelled to add to his valuation; and that he repeatedly filed amended exhibits to correct errors in previous exhibits to which his attention had been called.

It is needless to say that we do not approve of this method of attack and with these comments will dismiss the subject.

In their preliminary remarks, counsel for appellant stress the point that the findings of the Commission carried with them a presumption of reasonableness and correctness. As to this rule, we have no controversy but we insist that the court below did, in every instance where the evidence was not overwhelmingly to the contrary, indulge such presumption and adopt the findings of the Commission. This is repeatedly stated by the court

below in its findings which shows that the court gave to the Commission the full benefit of the claimed presumption.

We appreciate that the law places a presumption of reasonableness and correctness on the findings of a commission such as the one which made the orders complained of herein, but we also feel that the weight to be given such presumption depends on the circumstances of the case. The orders in question were issued by a commission composed of three members, the chairman, Mr. Greenleaf, having served on that commission and its predecessors through varying political administrations for a period of eight years, and as such commissioner had heard and determined many similar rate controversies. It is significant to note that Chairman Greenleaf refused to sign these orders and filed a dissenting opinion (R. 59). Neither Commissioner Hill nor Campbell is now on the Commission (R. 362).

On page 35 of the brief of counsel for appellant the statement is made: "In no case did the companies' witnesses give any breakdown of unit costs used by them in determining the value of this property," etc. This statement was, of course, made in a further attempt to depreciate Hamilton's testimony. The statement is not only unsupported by the record brought to this court, but is untrue. The same contention was made in counsel's brief before the Commission; and in answer thereto, appellees introduced before the Commission the full breakdown of all unit costs asked for, the same consisting of several thousand typewritten pages. A great deal of work and a great deal of expense were involved in preparing these exhibits to meet this objection; and after they were introduced, they were never opened or looked at.

So far as this appeal is concerned, the inquiry involves only four main questions, viz.:

1. The present value of the property of the Cities Service Gas Company used and useful in its business as of September 1, 1931, which the company contends amounted to $105,857,402.00; which the Commission found to be $73,170,510.00, and which the court held to be $82,380,583.00, in which figure the court included leases at cost of $5,727,272.00 instead of at their present value which the court found to be $12,000,000.00.

2. The net operating income of the Cities Service Gas Company before depreciation, which was found by the court to be $8,401,680.00.

3. A proper allowance for all depreciation and reserve requirements which the court found in the aggregate sum of $1,966,180.00.

4. The reasonable rate of return to which the Cities Service Gas Company is entitled, which the court found to be approximately 8 per cent.

The main controversy arises as to the first question, the value of the property of the Cities Service Gas Company. As stated by counsel for appellant in their brief, page 31, "All the engineers based their present value on reproduction cost less depreciation."

For valuation purposes, the property, other than cost of financing, was classified into forty accounts and items, which are listed in the opinion of the court below (303) and also on page 37 of appellant's brief. Twenty-nine of the accounts are given separate numbers, and eleven are given titles. The whole matter is greatly simplified by the process of elimination.

Of the forty accounts, there were nine accounts upon which Hamilton and Black placed identical values, which values were adopted by the Commission. These accounts

with the values placed thereon by Hamilton, Black, the Commission and the court are as follows:

	Hamilton	Black	Commission	Court
1316	$ 27,908	$ 27,908	$ 27,908	$ 27,908
1376	3,655	3,655	3,655	3,655
1380	106,035	106,035	106,035	106,035
1381	1,805	1,805	1,805	1,805
1382	23,084	23,084	23,084	23,084
1383	568	568	568	568
1385	8,202	8,202	8,202	8,202
1387	44,979	44,979	44,979	44,979
1388	21,832	21,832	21,832	21,832

Of the thirty one remaining accounts which entered into the consideration of the court below, there were nine with respect to which the difference in value between Hamilton and Black was so small that the adoption of one figure or the other could have brought about no possible difference in the final result; and for the purpose of saving time, trouble and expense, the appellees herein waived any controversy as to such items in the court below, and on such waiver the court, as a matter of course, adopted the value found by the Commission. These accounts appear below:

	Hamilton	Black	Commission	Court
1310	$ 37,194	$ 35,909	$ 35,909	$ 35,909
1311	50,162	47,876	47,876	47,876
1317	1,461	1,206	1,333	1,333
1329	155,018	133,310	133,310	133,310
1330	118,604	113,341	113,341	113,341
1334	6,835	5,633	5,633	5,633
1379	99,388	94,687	94,687	94,687
Gas in Storage	(1)	0	22,000	22,000
Working Cap.	770,126	775,000	775,000	775,000

(1) Included by Hamilton in Acct. No. 1333.

Of the twenty two remaining accounts, there were four which were arrived at by applying percentages to certain values of physical property found by the respective engineers. These percentages were agreed to by the parties and adopted by the court, so that no controversy exists as to them other than the controversy as to the base to which these percentages should be applied. These accounts are as follows:

	Hamilton	Black	Commission	Court
Engineering & Superintendence 5%	$3,166,329	$2,846,153	$2,881,000	$3,321,250
Administration & Legal	(384,586	(1,144,478	(394,084	(350,350
Preliminary & Organization (2¼	(384,586	(482,754	(480,008	(500,625
Miscellaneous Const. Exp.	(769,174	(0	(698,169	(700,769

Of the remaining 18 accounts there were five where the court, indulging the presumption of correctness of the Commission's findings, adopted them, and as no appeal was taken by appellees the same are not in controversy herein. These accounts are as follows:

	Hamilton	Black	Commission	Court
1313 (considered with 1312)	$ 573,124	$484,514	$658,439	$658,439
1315	385,746	261,887	265,746	265,746
1332	1,143,231	735,619	759,625	759,625
1384	81,448	74,481	81,448	81,448
1386	486,182	410,999	415,070	415,070

The remaining thirteen accounts or items which are controverted in the court below and which are in controversy here are as follows:

	Hamilton	Black	Commission	Court
1307.	($	$ 33,990	$ 55,982	$ 64,778
1327.	3,696,804	1,174,574	1,657,530	1,915,427
Total.	3,696,804	1,208,564	1,713,512	1,980,205
1312.	1,380,025	1,210,392	1,153,157	1,294,710
1314.	4,169,763	3,126,159	3,126,159	3,523,176
1325.	149,202	149,202	145,202	147,202
1328.	2,267,443	1,567,605	1,466,102	1,515,662
1331.	8,873,812	8,482,319	8,048,910	8,463,835
1333.	43,578,602	38,842,371	39,432,331	40,232,331
Going Concern Value	8,898,532	3,820,000	2,000,000	5,000,000
Gas Leases.	12,914,189	2,874,390	2,874,390	5,727,272

We will discuss the controverted items in the order listed.

On two of the remaining accounts, namely, taxes during construction and interest during construction, the court adopted the figure used by Black and the Commission, as opposed to the figure used by Hamilton, after having added to Black's figure depreciation erroneously deducted, and the addition of which was stipulated by the parties in the court below. The controversy as to interest is as to the rate of interest to be used during the construction period. There is no controversy as to the item of taxes. These two items as valued by the engineers, the Commission and the court are as follows:

	Hamilton	Black	Commission	Court
Taxes during Construction.	$ 769,174	$ 778,044	$ 778,044	$ 875,171
Interest during Construction.	6,337,986	3,859,204	3,883,282	4,471,934

For the item of material and supplies, the court adopted the figure presented by Black plus an addition made by the Commission of $119,275.00 covering spare parts in compressor stations which it was admitted during the Commission hearing had been overlooked.

	Hamilton	Black	Commission	Court
Materials & Supplies.	$667,371	$509,400	$628,675	$628,675

From this point on we will use the headings of appellant's brief:

1307—Production—Right-of-Way.
1327—Transmission—Rights-of-Way.

The above accounts are discussed under the heading, assigned error number 7, in appellant's brief.

In regard to these accounts, the court below made a finding of fact as follows:

> "1307-1327. (Mr. Black was the engineer for the Commission; Mr. Hamilton for the plaintiffs. Both are engineers of standing.) The Commission allowed $1.40 a rod for right-of-way. It used $1.08 as a basis, that figure being the average cost, as shown by the books of the company, of 31 per cent of its rights-of-way. To this the Commission added 22c per rod for expense of acquisition, and 10c a rod for abstracts and recording fees. The evidence clearly developed that the figure of $1.08 did not purport to represent all of the costs, and is not a dependable figure. The most dependable evidence is that of the man who negotiated for these rights-of-way during the past four years. His offering price, to all landowners, was 50c per rod for the land and 50c per rod for damages; sometimes he paid as much as $2.00 per rod for the land alone; the average damage paid was 65c. He did not state the average cost for the land, but it cannot be assumed that he acquired all of it at his offering price. It should not be figured lower than 65c, the average he paid for damages for which his offer was likewise 50c. These items make $1.30 per rod paid the landowner; adding to that the 32c allowed by the Commission for overhead, gives the figure of $1.62 which we have used. The company's figure of around $3.00 includes aerial surveys which were not used, and if used,

probably would have been worth their cost in a saving not reflected in its present valuation. Apparently, the company also included certain construction costs elsewhere accounted for." (R. 304.)

We are at a loss to understand appellant's discussion of these items as set out in its brief. The only evidence before this court is that included in the record at pages 395 to 405. This ten pages of the record is a condensed statement in accordance with the rules of this court prepared by the parties in which they have set out all evidence which they considered necessary for this court to consider in determining this issue. It is our understanding of the practice in this court that the parties are limited to the record so prepared by them in the presentation of their arguments. If so, practically all of appellant's argument must be eliminated, for there is no record whatever before this court to support the statements made or the arguments based thereon.

In the original presentation to the Commission, the evidence consisted of a valuation made by Black in which he included right-of-way at an average total cost of $0.997 per rod (R. 397). Eastman, one of Hamilton's engineers, testified that he had divided the system into nine groups in which groups a unit price ranging from $2.11 per rod to $3.54 per rod was applied to the actual number of rods in the groups respectively. Using these two methods, the value of the accounts as found by Black was $2,488,240 less than the value found by Hamilton, a difference which could not possibly exist if both engineers were properly informed (R. 395).

The experience of the two engineers making these widely divergent estimates of value and the source of

their information is stated as follows in the record at page 396:

> "As to the unit cost per rod to be applied to the number of rods in the system Black testified that he had never purchased any right-of-way and that the figures used by him were the result of information procured by his organization from other pipe line companies operating similar lines (fol. 470).
>
> Eastman, testifying as to Hamilton's valuation, testified that the figures used by him were the result of studies of the actual experience of the Cities Service Gas Company in the purchase of right-of-way in the territory under consideration, by studies of the experience of the Continental Construction Corporation in connection with its recently built line from the Amarillo field to Chicago, but he furnished no data as to the experience of any of these companies."

In an apparent attempt to reconcile this great difference in values, the Commission employed C. H. Montgomery, a certified public accountant and at one time a member of the Commission, to audit the books of the company in order to ascertain if possible the actual cost of right-of-way to it. The result of this audit was an exhibit in which the cost of right-of-way in an examination of 31 per cent of the total rods included in the two accounts was $1.08 (R. 397).

Testifying as to this exhibit of Montgomery's, Eastman stated that an analysis of job orders such as that made by Montgomery would not disclose all of the costs, as it was not the practice of the company to include in such job orders the cost of obtaining right-of-way carried on by the land and lease department, and the cost of settling damage claims and of abstracting and recording which is done by the legal department. He further

testified that the cost of securing right-of-way included all expense of men in the field, automobiles, phone calls and similar costs, and that such costs were a major item in connection with procuring right-of-way. This testimony is set out in full at pages 401 to 404 of the record.

On the testimony above outlined, the Commission was forced to the conclusion that Black was wrong in placing an average value of 99c per rod on right-of-way, and increased that value to $1.40 per rod (R. 107). In making this addition to Black's figure, the Commission not only admitted that he was in error but also admitted that the exhibit of Montgomery showing the cost of $1.08 per rod was incorrect and did not include all costs.

In addition to the testimony of Hamilton and that of Black and Montgomery, there was introduced before the Commission and the court the testimony of J. S. Gibson, who had been associated with the Prairie Pipe Line Company and the Prairie Oil & Gas Company for 22 or 23 years, and during that time had procured all of the right-of-way for said companies in a total exceeding 10,000 miles. Gibson's companies were never at any time associated or in any manner affiliated with any of the parties to this litigation, and his testimony was not in any manner impeached. Gibson testified that he had examined the cost analyses of right-of-way prepared by Hamilton and Eastman, and that, in his opinion, they were correct and reflected his actual experience except as to two items which it was not his practice to classify as entering into right-of-way costs, such items being clearing and grading, and aerial survey. The testimony of Gibson appears at page 398 of the record.

There was also introduced before the Commission and the court below the testimony of B. H. Hicks, at that time employed by the Cities Service Gas Company, his

duties being purchasing pipe line right-of-way and settling damage claims in which work he had been engaged for four years. Hicks testified that it was his practice under instructions from the company to start out to buy right-of-way for 50c a rod and 50c per rod for damages in advance; that settlement could not always be made on this basis, and that it was possible in some instances as much as $2.00 per rod for right-of-way and damages lumped together would have to be paid; and that the average damages per rod amounted to about 65c; that the average cost of acquiring right-of-way as distinguished from the purchase price was 22c, which would have to be added to the payment for right-of-way and the payment for damages. The witness further testified that he had nothing to do with such matters after the right-of-way contract was mailed to the home office, and had no acquaintance with subsequent costs (R. 399-400).

With the testimony of Black and the testimony of Montgomery discredited on account of inaccuracy, which the Commission itself admitted, and with the testimony of Hamilton and Eastman supported by their shown experience and their careful and detailed analysis of actual cost to the company, corroborated by the testimony of Gibson and Hicks who were not estimating but applying first hand knowledge acquired over years of personal experience, there can be no question but what any presumption of reasonableness which might attach to the finding of the Commission was overcome, and that the finding of the court below is sustained by an overwhelming preponderance of the evidence.

The statements made by counsel for appellant to the effect that the cost of field survey in staking the rou of the line was improperly included; that miscellaneous expenses were improperly included; that the cost of

clearing, grading and fencing was improperly included, and that other items were included improperly in the estimates by Hamilton and Eastman, are none of them supported by the record, and, of course, cannot be answered by us by reference to the record. All we can do is emphatically deny the correctness of any such statements, and ask that they be eliminated from consideration as not supported by the record, which appellant prepared.

Many like statements appear in the comments of counsel concerning which we can only make the comment that they are not supported by any evidence in the record.

It is the contention of appellees that the study made by Hamilton and Eastman of the actual experience of the Cities Service Gas Company, not of job orders alone, but of all expenses in the land and lease department, the legal department, and all other departments having to do with procuring right-of-way is entitled to the greatest weight of any testimony introduced. Their testimony did not consist of their opinion as experts as to what right-of-way costs should be, or of estimates based on hearsay information, as was the case with Black, but upon actual investigation and analysis of the experience of the company as shown by the records of its several departments. We feel that this evidence, corroborated as it was by Gibson and Hicks, should have been given greater weight by the court below and that the value of these two accounts should have been materially increased. However, the decree below was in favor of appellees, and they did not and could not appeal. We therefore stand on the finding of the court, insisting that it is supported by the overwhelming evidence.

1312—Production—Gas Well Construction.
1313—Production—Gas Well Equipment.

These accounts are discussed by appellant under the heading, assigned error Number 8.

As stated in appellant's brief, the court below added to the Commission's valuation an item of $57,233.00 on account of storage wells and an item of $84,318.00 on account of well construction generally.

In its consideration of these accounts, the Commission treated its expert, Mr. Black, rather roughly, and registered very little confidence in his judgment, considering the labored attempt previously made in its brief to appreciate his standing as a witness and depreciate the standing of Hamilton. The Commission found that Black had equipped his wells in a manner entirely unknown to the industry, and added $173,925.00 to his valuation of these accounts (quite a sizable item for an engineer at all experienced in the gas business, or as careful and painstaking as counsel have stated, to overlook). The Commission also refused to follow Black's judgment as to the item of $57,233.00 which Black had included in his valuation as the depreciated value of storage wells, and eliminated that item entirely.

The entire record before this court so far as storage wells is concerned consists of two paragraphs at page 378 of the record and a stipulation of two paragraphs appearing on page 373.

There is nothing in the record above cited upon which the argument of counsel could be based, and the only conclusion that can be drawn from the record is, that under some sort of arrangement, the details of which are not disclosed, the company has possession of and operates storage wells for which it pays the owners of the land upon which the wells are located a rental. Counsel's brief re-

fers to the contract introduced in evidence in the court below, as does the stipulation, but the contract itself is not included in the record, and this court cannot construe its terms, being unadvised as to what they are.

It is sufficient to say that the company is in possession of these wells and is using them for storage purposes under such circumstances as caused both the engineer for the Commission and the company to include them in their respective valuations and compelled the court below to reverse the Commission and put the admitted value of the wells back in the valuation. Whatever the arrangement is, it is one agreeable to both the company and the landowners, and such an arrangement as causes the landowners to recognize the right of the company to the possession of the land and its use for storage purposes. There is nothing whatever in this record to lead this court to believe that these wells so far as the hole in the ground is concerned belong to the landowners, and there was no such evidence in the court below as is evidenced by its finding.

Counsel for appellant make the further statement not supported by the record that, "If the wells cost the company nothing at the time the storage contracts were acquired, it is not reasonable to assume that the holes would have to be purchased if the pipe line system were reproduced." There is nothing in the record to indicate that the wells cost the company nothing at the time they were acquired, and the only assumption that can be made with regard to reproducing the pipe line system is that nothing of the sort being in existence, the company would have to acquire land for storage purposes and drill the required wells to put the gas in storage. It is apparent that the expense of so doing would be infinitely greater than the value now placed on these storage wells.

As to the item of $84,318.00 which the court added to the Commission's valuation, the entire record discloses and the court below found that the actual cost of well construction to the company was much greater than the amount allowed by either Hamilton or Black. After having added $173,925.00 to Black's valuation on account of Black's prices for casing and tubing being insufficient and thereby admitting that Black was in error as to the material in the account, the Commission accepted the value testified to by Hamtilton which it "corrected" by applying the overheads used by Black. This is rather a strange procedure, for if Black was entirely in error as to the prices of materials and labor in the wells, there was no reason for the Commission to believe that he was correct and Hamilton was wrong as to the overheads.

The situation as presented to the court below was this: After correcting Black's valuation by adding $173,925.00 and after returning to Black's valuation the item of $57,233.00 which the Commission had deducted on account of storage wells, the difference between Hamilton and Black was $84,318.00.

Notwithstanding the fact that Black's valuation of this account had been entirely discredited on account of the grossly insufficient amount allowed for well equipment, the appellees below introduced evidence as to the actual cost of construction of the wells which the two engineers had valued as such actual costs appeared of record on the books of the company. In addition to this showing, there was also introduced in evidence a showing as to the cost of similar wells in the same field drilled by other producers. The evidence as to the construction cost of these wells was in no sense the estimate of anyone, but consisted of actual book figures showing to a cent the amount of money which the wells in question had actually cost the

parties drilling the same. This evidence appears in the record beginning at page 379.

The Commission attempted to meet this convincing testimony by putting on the witness, Richie, a man who had never seen the wells in question, who estimated that he could drill such wells at less than the actual cost to this or other similarly situated companies. (R. 384).

The court below, therefore, had before it the valuation of Hamilton which was less than the actual cost of the wells to the company, the testimony of Black which was discredited as above set out, and the testimony of Richie who was merely estimating, just as Black did, without regard to actual experience. The evidence showed that the value testified to by Hamilton and Eastman was arrived at by analyzing the actual cost to the Cities Service Gas Company of drilling wells in the several fields and by dividing such actual costs into the number of feet drilled in order to arrive at a unit cost per foot, which unit cost was then adjusted for material and labor to present prices, and then applied to the several wells (R. 384). On this record the court could not have arrived at any conclusion other than that the valuation of Hamilton was the most accurate evidence before the court and that even his value was insufficient. By adopting Hamilton's value and putting the item of $84,318.00 back into the valuation the court was certainly acting upon evidence amply sufficient to overcome any presumption of correctness of the value found by the Commission and in accordance with the overwhelming weight of all the evidence.

1314—Field Line Equipment.

This account is discussed by appellant under its assignment of error Number 9.

The court below made a finding as follows:

> "1314. We have added $397,017 to this account. The Commission adopted Mr. Black's estimate, which was based on assumption that field lines were buried, on the average, to one-half the depth of main lines. The company's valuation was based upon the facts. Black testified his figures would have been more accurate if he had had time to gather the facts. It clearly appears, also, that field lines are more expensive to construct than main lines; they are in smaller units; more hand-labor is involved, and more connections are necessary; also the cost of field lines cannot be decreased by taking advantage of topography, as may generally be done with main lines. The *company's figures* are strongly buttressed by an analysis of actual cost of field lines utilizing 20,600 tons of pipe. The assumptions of the Commission and its engineers cannot stand against the facts." (R. 305.)

Counsel devote a number of pages of their brief in a laborious effort to show that the addition of $397,017.00 to the account by the court was erroneous. In making this argument, counsel entirely overlook the record before this court, the entire record consisting of two and a half printed pages, 388 to 390. Nowhere in this record is there any statement as to the number of feet of field lines, their size or location, or the number of yards of excavation used by Hamilton or by Black in their respective values. The entire argument is outside the record, and it is impossible for us to answer it and confine ourselves to the record. However, for counsel's information, we desire to state that all of their argument is erroneous even if the entire record before the court below is considered.

Black testified that in the Texas field he applied one half the depth of the main line to gathering (field) lines four inches and under in size and as to field lines in other states used half the depth of main lines up to 10¾ inches. (R. 389.)

Counsel state on page 59 of their brief:

> "In pricing this account, Black testified that all field lines in Texas up to and including four-inch were *priced* (italics ours) on the assumption they were buried one-half the depth of the main line."

This is exactly what Black did but is the opposite of what counsel argue. As we read the brief counsel contend that notwithstanding Black assumed field lines to be buried one-half the depth of main lines, he arrived at a greater number of yards of excavation than did Hamilton, even if his assumption was wrong, and that therefore the Company was benefited and not prejudiced and the court below should have made a deduction from the valuation rather than an addition. The error counsel make is in assuming Black estimated the yardage in field lines at one-half the yardage of main lines. He did nothing of the sort but on the contrary figured the yardage of excavation and back-fill the same for all lines and then *priced* the field line yardage at one-half the *price* used by him for main lines. In making this estimate Black concluded there were 22,902 cubic yards more than Hamilton and Eastman found by actual inspection of the lines themselves. But in valuing the main lines he used a unit cost of $0.35 per cubic yard for earth excavation and backfill, and in valuing field lines a unit cost of $0.175, one-half, just as he is quoted by counsel as having testified. This procedure resulted in a value equivalent to that which

would result from computing the total number of yards as though the trenches were one-half the depth of main line trenches, but that is entirely different from stating that Black's calculation was to the advantage of the company for the practical result is that Black used 141,486 cubic yards less than was priced by Hamilton instead of 22,902 cubic yards more as stated by counsel. Because of this, all of counsel's comparison of the yardage used by Hamilton or by the court with that used by Black is erroneous. In other words, Hamilton and Black found approximately the same number of yards of excavation to be necessary in connection with field lines, Hamilton applying thereto the proper unit cost, and Black applying thereto the unit cost he felt to be proper divided by two. This being true, the whole argument of counsel falls, whether supported by the record or not.

There can be no real controversy at this time as to field lines costing more than main lines instead of one-half as much so far as the items of excavation and back-filling are concerned. Counsel's entire argument in effect admits this but seeks to avoid the true consequences. Any doubt is removed by the testimony of A. D. Bechtel (R. 391), E. McDonald Biddison (R. 393), T. R. Jones (R. 393), and Ross M. Stuntz (R. 394). All of these witness testified that field lines were more expensive in their construction than main lines of the same size and also that any estimate as to the value of such lines based on the assumption that they were buried to one-half the depth of main lines was erroneous.

In its finding quoted above, the court said:

> "The companies' figures are strongly buttressed by analysis of cost of field lines utilizing 20,600 tons of pipe. The assumption of the Commission and its engineers cannot stand against the facts." (R. 305.)

It is our contention that under this finding the court should have added to this account $1,043,604.00 which was the difference between the value found by Black and adopted by the Commission and the value found by Hamilton after an actual analysis of company costs. As no appeal was taken by the appellees, they are, of course, bound by the court's finding; but certainly the evidence before the court not only overcame any presumption of correctness as to the Commission's finding, but warranted an addition to the valuation of a much greater sum than was added by the court.

1325—Transmission Land.
1328—Compressor Station Structures.
1331—Compressor Station Equipment.

This account is considered under appellant's assignment of error Number 10.

As to account 1325, the valutions of Hamilton and Black were identical, $149,202.00, but the Commission deducted $4,000.00 on account of its holding that the Hogshooter and Owasso stations were not used and useful. As to account 1328, Black's valuation was $699,839.00 below that of Hamilton. The valuation of Black was adopted by the Commission after they had still further reduced that valuation by the deduction of $101,503.00, Black's figure for the compressor station structures at Hogshooter, Hominy and Owasso eliminated as not used or useful. As to account 1331, Black's figure was $391,393 below that of Hamilton. The Commission adopted Black's figure after reducing it by $433,509.00 for the equipment at Hogshooter, Hominy and Owasso, which resulted in the Commission's value being $824,902.00 less than that found by Hamilton.

In the court below appellant agreed that the value of land, structures and equipment at Owasso might be eliminated, but contended that the land, station and equipment at Hogshooter was used and useful and also the land and buildings at Owasso.

The court found on the evidence that the Hogshooter station was used and useful and a component part of the pipe line system of the Cities Service Gas Company as it now exists, and put back into the valuation $2,000.00 for the land upon which that station is located (account 1325), $49,560.00, Black's value of the compressor station structure at Hogshooter (account 1328), and $414,925.00, Black's value of the compressor station equipment at Hogshooter (account 1331).

In the court below the appellees contended that Hamilton's value for compressor station structures, which was greatly in excess of that of Black, should be adopted by the court, because it was corroborated by the evidence showing the actual cost of such structures to the company and by estimates made by independent contractors. The court, however, indulged the presumption of the correctness of the Commission's finding, notwithstanding this evidence, and as to the three accounts made no additions other than to restore at Black's valuation the land, compressor station structure, and equipment taken out of Black's valuation by the Commission. As the appellees did not appeal, the sole controversy now is as to whether or not the Hogshooter station should be included as used and useful. The only evidence upon which the Commission took out of Black's valuation the land, structure, and equipment at Hogshooter is the following, as shown by the record at page 406:

> "Black introduced in evidence, as Exhibit 53, photostatic copies of sworn tax returns of the Cities

Service Gas Company to the Oklahoma Tax Commission in which reports it was stated that at the date of said returns, February 1, 1931, the Hominy compressor station was being reclaimed and that the Hogshooter compressor station 'is now and has been abandoned for several years. This property is now subject to sale and reclaim and has only a junk or salvage value of not to exceed $5,000.00.'"

It will be noted that the tax return referred to was made as of the date of February 1, 1931, and that neither by other tax returns nor by any other circumstances did anyone attempt to show that the condition which existed on February 1, 1931, continued to the time of the hearing before the court below. It is also persuasive that Black did not consider this tax return as of any evidential value or that he had outside information to the contrary, for he did include all of these items in his valuation, his inventory, of course, being made at a later date than February, 1931.

As against this evidence, if it be evidence at all, is the testimony of Eastman, set out on pages 406, 407 and 408 of the record. Eastman is an engineer who has been intimately associated with the operations of the Cities Service Gas Company for many years, and who was thoroughly familiar with its past and future plans of operation.

In the court below it was stipulated that the affidavit of George H. Baird, general superintendent of the operations of the whole system of the Cities Service Gas Company, should be treated as his testimony, such affidavit appearing in the record at pages 499 to 504, inclusive.

In his testimony Eastman went over in detail the reasons for originally building the Hogshooter station, and the reasons why it was temporarily considered as no

longer useful at its then location, and the subsequent changes in the source of supply of the Cities Service Gas Company which again made the operation of said station necessary or made necessary an increase in the capacity of other stations. This testimony is convincing, and we respectfully ask the court to read it in full as set out in the record. The substance of Eastman's testimony is set out in the following questions and answers:

> "Q. In your opinion, Mr. Eastman, is that Hogshooter station at this time useful to the pipe line project of the Cities Service Gas Company? A. Yes, sir, it is.
>
> Q. And it is the bona fide intention of the company to place it in operation? A. That is correct. I am not positive that it is in operation today." (R. 407.)

The last answer of Eastman undoubtedly is incorrectly reported, as what he intended to say was, that he was not positive that the station was not in operation today, as is shown by other testimony not quoted.

George Baird, the man in direct charge of the operations of the Cities Service Gas Company and most familiar with its then and future plans of operation, in his affidavit recites in great detail the changed situation which makes this station a necessity to the operations of the Cities Service Gas Company, a part of said testimony being as follows:

> "That on account of said extensions into Missouri and the said consequent enlargements plaintiff has been, and is holding the Hogshooter compressor station in constant readiness to serve its said pipeline systems and especially its said extensions into Missouri. That by use of said compressor station it would add a transmission capacity of approximately 20,000,000 cubic feet of natural gas daily and by such

use it can accomplish such result much cheaper than in any other manner. That while said order of the said Texas Railroad Commission is operative it will be necessary for plaintiff in cold weather to use said Hogshooter compressor station to increase the transmission capacity of its lines from whatsoever source it gets its added gas supplies, and whether said Texas order remains in force or not upon resumption of normal financial conditions or the natural growth of the Missouri markets along the said newly constructed extensions the economical operation of plaintiff's system will require the operation of the Hogshooter compressor station." (R. 503.)

With all of this direct and positive evidence to the effect that the Hogshooter station is used and useful the court was clearly right in its holding that the mere showing of a tax statement filed by the tax department of the company, entirely disassociated from the operating end of the business, was not of sufficient weight, if it had any evidentiary value whatever, to uphold the finding of the Commission that this station was no longer used and useful.

1333—Transmission—Line Equipment.

This account is discussed under appellant's assignment of error number 11.

The cost of reproduction new for this account found by Hamilton and Black, respectively (R. 415), is $46,893,014.00 and $43,099,711.00; Hamilton's figure exceeding Black's by $3,793,303.00. The present values for this same item (R. 415) are Hamilton, $43,578,602.00, and Black, $38,842,371.00, a difference of $4,736,231.00. The Commission valued the property under this account depreciated at $39,432,351.00, being an increase of $589,-

960.00 over the value found by Black, but still $4,146,271.00 less than the amount claimed by Hamilton. The addition of $589,960.00 made by the Commission was due to Black's having omitted items of painting on pipe, and to Black's not having used a sufficiently great differential between the cost of plain end and threaded and coupled pipe.

The court below, indulging the presumption that the finding of the Commission was correct, adopted the percentage condition of 90.1 per cent used by Black, as opposed to 92.93 per cent used by Hamilton, thereby disposing of $1,219,722.00 of the above mentioned difference in addition to the $589,960.00 corrected by the Commission. The remaining difference between the present value found by Hamilton and found by Black can be altogether accounted for by the difference in rock excavation, for which item there was included in Hamilton's valuation $4,211,120.00 (R. 307), and in the Black valuation $1,270,115.00, Black being lower than Hamilton by $2,941,005.00. This difference is accounted for partially by the greater quantity of rock excavation found by Hamilton, and partially because of the higher price applied to the yardage of rock excavation which Hamilton used. The court resolved the difference so far as price was concerned in favor of the Commission, thus again indulging the presumption that the Commission's finding was correct, although the court expressed itself as not entirely satisfied with the figure used (R. 307).

The finding of the court as to this account is as follows:

> "1333. The difference between the engineers' valuations of this item is about $4,000,000. The dispute narrows down to three items: (1) The Commission

found the property to be in 90.1 per cent condition. The company asserts it to be in 92.93 per cent condition. The Commission's finding is supported by the testimony of its engineer, and a consulting engineer called by the company. We approve the Commission's finding as to per cent condition. (2) The cost of rock excavation. There was a dispute among the experts, but the Commission's finding is supported by the testimony of its engineer and a contractor who had done much of this work. Elaborate comparisons of costs of selected lines are introduced to show the error in the Commission's cost figure. But the results depend largely on the lines selected. While not entirely satisfied with the figure used, we are not disposed to disapprove the finding as to the cubic yard cost. (3) There is a difference between the engineers as to the amount of rock excavation in the lines. After the hearings before the Commission, engineers for both sides drilled a hole every quarter of a mile along a main 125 miles long. That extensive investigation developed that the percentage of rock excavation was 20.94 per cent instead of 10.46 per cent used by Black. If overcuts are included, the percentage is 28. We are inclined to believe that overcuts should be excluded; it is probable that contracts for trenches would be predicated on the trench depth, and would not call for overcuts caused by the inability to blast to a neat line. This additional evidence convinces us that Black's estimate of the amount of rock excavation is too low. His estimate on the line used for the test was 24,000 yards; Hamilton's was 72,482 yards. The test showed on Black's own figures, exclusive of overcuts, 46,790 yards. The subject is not capable of exact proof, but we are of the opinion that Black's amounts of excavation should be materially increased. Mr. Hamilton's valuation of rock excavation is $4,211,120; Mr. Black's $1,270,115, of which $1,154,503 is in this account. Applying

> Black's price to an increased amount indicated by the test, results in an increase of this item from $39,432,331 to $40,232,331." (R. 307.)

There being no appeal by appellees, the present controversy is limited to the third item in the above finding—the amount of rock excavation.

There was no evidence before the Commission other than that testified to by Black, Hamilton and Eastman. Black's qualifications as set out on page 419 of the record are as follows:

> "Black testified with respect to classified excavation that he determined the percentage of such excavation by observation of the territory through which the major part of the line passed and from his knowledge of the territory (fol. 494) gained through more than twenty years of experience. He testified that he made a personal inspection of line 'G' from Wichita to Ottawa; that he allowed $2.50 per cubic yard for all classified excavation whether solid or loose rock and had allowed this amount in addition to ordinary cost of trenching and backfilling of ditches of the same dimensions."

The estimates of Eastman and Hamilton were made in the manner and from the sources of information set out in the record at pages 416 and 417, in part as follows:

> "Eastman testified that the amount of rock excavation shown by Hamilton's valuation was determined by engineers sent out over all the lines for that purpose and who procured their information from surface observations and from talking with company employees who had been in charge of maintenance work for years and from repeated excavation of the lines were familiar with soil conditions. That where shoot-rock was shown in the valuation

it had been calculated as solid from top to bottom of the trench, and that where pick-rock was shown the entire excavation had been calculated as pick-rock. That he developed a unit of cost of $7.38 per cubic yard for shoot-rock and $4.01 per cubic yard for pick-rock. Mr. Eastman further testified: * * *

"'We did not attempt to determine rock excavation on a percentage basis. At the beginning of this work, we sent four engineering parties into the field for the purpose of checking lines. These parties were each composed of two graduate engineers, and they went over these lines in detail, in many cases walking the length of the line, together with the district superintendent of that district, or his foreman, or the line walkers. They went over each line and every line in detail to determine the amount of rock excavation on that particular line.'"

It would appear from the foregoing qualifications of the respective engineers and the nature of the investigations made by them respectively that the valuation of Hamilton should be given much greater weight than that of Black. Throughout the entire case before the Commission there had been no instance in which its attention had been called to mistakes made by Hamilton or his engineers in the valuation presented by them other than the contention that prices used were too high. On the contrary, it had been shown to and was admitted by the Commission that Black was mistaken as to his well equipment, on account of which many thousands of dollars were added to his valuation; was mistaken as to the differential to be applied between plain end and threaded and coupled pipe, which resulted in a difference of $589,000.00, corrected by the Commission itself; was mistaken as to the cost of right-of-way, on account of which mistakes the Commission corrected his valuation

in the sum of $494,948; and was mistaken, as is in effect admitted by counsel in their brief, in assuming that field lines were buried to one-half the depth of main lines.

In connection with his study of observed depreciation in order to ascertain the percentage condition of the underground part of the pipe line system, Hamilton had his corps of engineers spend many weeks in going over the system uncovering the pipe and taking samples or coupons therefrom in order to demonstrate the actual depreciation the pipe had sustained. In doing this work 1328 excavations were made to the pipe, such excavations being distributed throughout the entire system. In addition to this, detailed studies were made of reports covering 16,330 excavations made in the course of ordinary maintenance work through a period of recent years. These studies were all made in connection with the determination of depreciation; but as that issue was eliminated by agreement in the court below, the evidence was not brought to this court, counsel for appellees not having anticipated the attack which would be made on the account under discussion. These studies in connection with depreciation gave Hamilton and his corps of engineers information in regard to the rock in the system which could not possibly have been attained by Black and his engineers.

Notwithstanding this showing as to the relative competency of the two engineers, the Commission eliminated from Hamilton's valuation $2,941,005.00.

There being such a great and inexcusable difference in the amount of rock excavation found in the two valuations and the Commission having cut so deep, the appellees decided to find out what the actual facts were. Black had testified as above quoted that he had personally

inspected line "G," 125 miles of line from Ottawa to Wichita, and taking his word for it that he knew more about this line than any other, appellees decided to have an actual impartial test made of it. A truck was equipped with a compressed air drill and an independent and disinterested contractor, George P. Reintjes of Kansas City, Missouri, was employed to assemble the necessary help and proceed to ascertain the truth. Black and Hamilton were invited to attend or send a representative so that all parties would be equally advised and no advantage could be claimed to have been taken by anyone. Both Black and Hamilton sent engineers, and the test proceeded. This party, with representatives of both engineers, sank 291 holes (R. 431), observed the actual conditions existing and Reintjes made his reports as appears in the record at page 431. This report showed conclusively that Black's allowance of 10.46 per cent should have been 20.94 per cent (R. 433) and that if the necessary over cuts were included in the consideration, the percentage should have been 28 per cent, the percentage of over cuts as shown being 7.09 per cent.

We had hoped that this actual test would settle the controversy, but it only brought forth another flood of argument such as is contained in appellant's brief. It had to be admitted, of course, that Black's allowance for this particular line, which the Commission adopted, would have to be more than doubled, but the contention was resorted to that this test had no probative value as to the balance of the system, and this, notwithstanding the fact that the line was selected which Black said he personally inspected.

The court below was greatly impressed by the results of this test, as is shown by the finding quoted above, and after considering this evidence in connection with the

record before the Commission, restored $800,000.00 to the valuation, leaving $2,141,005.00 which it did not allow.

The court allowed nothing for over-cuts, although that item alone would amount to an addition of $560,000.00 to the valuation. The court did not find that such over-cuts were not proper, but merely stated, "We are inclined to believe that over-cuts should be excluded; it is probable that contracts for trenches would be predicated on the trench depth, and would not call for over-cuts caused by the inability to blast to a neat line." (R. 307.)

This reasoning of the court assumes that these lines would be contracted, and not built by the company itself, which is an assumption that Black refused to recognize throughout his valuation, as he at no time allowed any amount for contractor's profit.

In addition to the doubt expressed by the court as to over-cuts the court was not satisfied that $2.50 was a proper allowance for rock excavation, but adopted that figure by reason of its indulgence again in the presumption that the finding of the Commission was reasonable. The language of the court is: "While not entirely satisfied with the figure used, we are not disposed to disapprove the finding as to the cubic yard cost."

By reason of having eliminated over-cuts and having adopted the price of $2.50 per cubic yard for rock excavation, the court eliminated from the valuation many thousands of dollars. The appellees, therefore, feel that the allowance made by the court for this account is entirely inadequate, but as no appeal was, or could have been, taken, the finding of the court below must prevail. Nevertheless, all of these considerations should be given their due weight in determining whether or not the result finally arrived at is unduly favorable to appellees.

The entire argument of the appellant with respect to this account is, that the results of the actual test made on line "G" cannot be applied to the system as a whole without leading to an apparent absurdity. That the actual facts when the system as a whole is considered could not be determined without a similar test on every mile of line in the system is apparent. It is also apparent that applying the demonstrated results of this test to some particular line chosen by appellants for the purpose results in apparent absurdity. However, none of this argument in any way lessens the value of this test as to the correctness of Black's conclusions as applied to the line which he said he personally inspected, and which line was chosen for the test by reason of the fact that it was the only line he did personally inspect. Neither is there anything in the record or in counsel's argument to indicate that this test applied to the system as a whole would not result in an approximately correct conclusion, which conclusion would add a comparable amount to the rock excavation in Black's valuation. The test not only demonstrated the amount of rock in the ground, but the percentage of error in the engineer, which percentage can be fairly applied to his finding of rock excavation in the whole system.

There is no question but that in the system as a whole there are many sections in which rock predominates, and other sections in which there is substantially no rock. Either party could, for the purpose of argument, select some section of the system and apply to it the proven percentage of rock in some other section, and demonstrate conclusively that such percentage was not applicable. However, it is reasonable to assume that taking the system as a whole, the percentage of rock is substantially the same. There is no record before this

court containing evidence that the system as a whole should not properly be judged by the 125 miles in line "G," although that section of line was not selected as a representative section, but was selected because Black had personally inspected it and had more knowledge with respect to it than any other line. However, it is a representative section as to that part of the system in which rock is known to exist, and for the purpose of demonstrating, as it did demonstrate conclusively, that Black's allowance should be more than doubled in order to reflect actual value.

Appellant's discussion is confined almost entirely to an attempt to show discrepancies by applying the test on line "G" to other parts of the system. Counsel completely overlook the fact that appellees introduced evidence as to the actual cost to the company of eleven major lines constructed in recent years (R. 426). The purpose of this showing was to demonstrate, and we believe it did conclusively demonstrate, that the actual labor costs to the company in the construction of these lines were materially greater than were the labor costs allowed by Black, and that Black's failure to approximate these actual costs resulted largely from his failure to properly estimate rock excavation.

Black's affidavit (R. 440) admits that his rock excavation for line "G" was low by $56,972.00, which is 11.86 per cent of the out-of-pocket cost of labor on this line, as testified by T. R. Jones (R. 420). Appellant's discussion of these costs attempts to show that the addition for rock excavation made by the court below resulted in an absurdity when applied to certain specific lines. Those lines which were listed in the record (R. 426), wherein a comparison was made between labor costs shown by Hamilton, the actual expenditures made

by the company in the construction of the lines, and labor costs shown by Black, do not permit any such conclusion. Below are listed seven lines on which the actual labor costs were analyzed, and which lines were comparable to line "G" in that they ran through adjacent territory and through territory that did necessitate rock excavation.

This tabulation shows that the inclusion in Hamilton's valuation for labor on these lines was $1,408,772.00, and that the actual expenditures for labor by the company for the same lines was $1,398,638.00, a difference of $10,000.00, or less than .8 of 1 per cent.

Black's inclusion for labor in his appraisal of these lines was $1,057,173.00; and his figure thereby varies from the actual cost by $341,465.00. To his figure there should be added 32.3 per cent to bring his estimated labor costs up to what the actual costs of construction were.

This tabulation, instead of proving that the court below erred in allowing too much for rock excavation, shows that its addition of $800,000.00 to Black's valuation was very much below the amount which should have been added. The tabulation to which we have referred above is as follows:

Name of Line	Comparison of Labor Costs Hamilton	Actual Cost	Black	Per Cent Increase of Actual Cost Over Black
Ft. Scott 8"	$ 194,736	$ 215,959	$ 139,639	54.66
Springfield 10"	489,809	427,633	343,085	24.64
St. Joseph 12"	190,224	170,286	157,268	8.28
St. Joseph 16"	58,582	67,080	43,803	53.14
So. Trunk 16"	111,172	111,098	86,459	28.50
Topeka 16"	192,177	206,107	144,869	42.27
Ottawa-Lawrence Jct 20"	177,072	200,475	142,050	41.13
Total	$1,408,772	$1,398,638	$1,057,173	32.30

The figures found by Hamilton compare favorably with the actual cost to the company of the eleven lines ana-

lyzed, corroborate his findings and discredit the findings of Black. This is also true as to the results of the test on line "G" if overcuts are included, as set out in Reintjes's report, in which event the findings of Hamilton are not, as stated by counsel, as much too high as the findings of Black are too low.

When estimates and opinions refuse to be reconciled, there is but one recourse and that is to the facts, if available. The facts in this case have been shown by the test of line "G" and actual labor costs in the construction of the lines which the engineers estimated. These facts must be much more persuasive than estimates.

Engineering and Superintendence During Construction.

This account is discussed by appellants under assigned error No. 12. The finding of the court below appears in the record, page 308, as follows:

> "Engineering and Superintendence is stipulated by the parties to be 5 per cent of the value of the properties excepting accounts Nos. 1316, 1380, 1381, 1382, 1383, 1384, 1385, 1387 and 1388. The parties have stipulated that this and other overheads should not be depreciated. Accordingly we have computed overheads by applying the Commission's percentage to the undepreciated values of the property, using $66,425,000."

There was no controversy as to this account except as to the base to which the agreed percentage should be applied. The court applied this percentage to $66,425,000.00, whereas appellants contend it should apply to a much greater value to be determined by this court's consideration of the matters herein set out.

To be corrected as shown in this brief, page 48.

Preliminary and Organization Expense.

The finding of the court was as follows (R. 308):

> "Preliminary and Organization Expense. We adopt the Commission's finding of ¾ per cent of the values of the physical properties; and for Administration and Legal Expense, ½ per cent on physical values, including engineering; for Miscellaneous Construction Expenditures, 1 per cent, on same values."

The percentages recited in the above finding have been agreed upon by the parties. No controversy exists as to them other than the controversy as to the base to which the agreed percentages should be applied. If the value found by the court below is sustained by this court, the lower court's allowance for this item should be adopted, although in the court below it was our contention that the base should be substantially greater. If this court should find that the court below should have included leases in the rate base at their present value instead of their cost or should make other additions, such agreed percentages should be applied to the addition so made.

To be corrected as shown in this brief, page 48.

Administration and Legal Expense During Construction.

This account was included by the court in the finding quoted under the preceding heading and what we have stated with respect to the previous account applies hereto.

To be corrected as above stated.

Miscellaneous Construction Expenditures.

Same as stated under preceding heading, with same correction.

Taxes During Construction.

No controversy.

Interest During Construction.

The finding of the court with respect to this account is as follows (R. 308):

> "Interest during construction. The Commission used a rate of 6 per cent, the company 8 per cent. It is customary to calculate this item at the prevailing rate charged a person with good credit for temporary advances, which is now 6 per cent. This throws upon the borrower, the owner of the property, the hazard of the borrowed money during the construction period, which must be considered. Two per cent is a reasonable allowance for that hazard, but it is customary and preferable to make this allowance as a part of Going Concern Value. The parties have agreed that this item, as well as taxes, should not be depreciated. We have taken the Commission's figure, increased by 6 per cent on the difference in values found, approximately $200,000."

The record with respect to this item consists of the evidence abstracted on pages 442 and 443 of the record and the evidence with respect to a proper rate of return appearing in the record at pages 528 and 529.

In his valuation of this item, Black used 6 per cent as a proper charge for interest during construction, and Hamilton used 8 per cent. Both engineers used approxi-

mately a two-year construction period, Black applying 6 per cent and Hamilton applying 8 per cent to the average investment throughout the two-year period, which was equivalent to applying, respectively, 6 and 8 per cent to all the property for one year. The court below found that 8 per cent was a necessary rate of return for the company (R. 317) after the plant was placed in operation and in effect found that 8 per cent was a proper charge for interest during construction, the court dividing the charge into 6 per cent as the cost of money and 2 per cent for the hazard of carrying the investment. The court states in its finding, "It is customary and preferable to make this allowance (2 per cent for hazard) as a part of going concern value." We do not believe the court is correct in finding that it is customary or preferable to so handle this account and believe the court should have valued this account by applying 8 per cent to the value found by it. It is, of course, immaterial to appellees whether this allowance is included in interest during construction or in going value, but in its consideration of going concern value as hereinafter discussed the court must bear in mind that included in the allowance made by the court below is an allowance of 2 per cent for interest during construction and in considering the allowance for going concern value the court should deduct therefrom $1,490,545.00, which is one-third of the 6 per cent allowed by the court under interest during construction, to-wit: $4,471,934.00.

Interest during construction is that portion of the return to which an investor is entitled which is capitalized during the period prior to the time when the property goes into operation. During the construction period when there are no operating revenues, the investor has

no method by which he can secure a return on his investment in any other manner. During this period he is denied any return on his investment and, therefore, the courts and Commissions have approved the allowance in the rate base of an amount equal to that return of which he is deprived as a part of the cost of the project to the owner.

The return on the money which the investor sacrifices during the construction period is just as much a cost to him as is the money which he furnishes for the construction of the property. The rate at which he should be compensated for that sacrifice logically must be the rate that is considered a fair return on the property after it goes into operation.

As a practical matter the cost of money borrowed for construction purposes always exceeds the cost of money borrowed on the same type of property that is in operation with customers attached and a history of successful operation behind it.

Allowances for interest during construction at low rates have been made at times by Commissions who were confused because of the fact that an operating company with a large amount of property and a successful operating record behind it sometimes borrows money to construct an additional plant and is able to secure it at prices as low as, or lower than, what has been determined to be a fair return. The confusion arises from the fact that the reason such loans are made is not based on the security back of the loan which will be furnished by the property to be constructed, but on the security and credit which has been established by the other and larger amounts of property which have been constructed in the past and which already have a successful operating record.

No bank would loan money at any rate of interest to a company which could pledge as security only the property to be constructed for that money, because ultimately it would have as security for its loan an amount of property equal only to the original loan itself with no margin whatever to secure the interest to be paid on that money. The loans that are made by banks are secured either with collateral far in excess of the loan or are made to a company whose credit has been established by its ownership of property far in excess of the loan. The interest rates of such loans are no indication of the fair return to which an investor is entitled for the sacrifice of return on his money during the construction period in a project, the success of which can only be demonstrated after the construction period is ended and after a period of successful operation.

The risk which the investor who furnishes construction money takes is the risk that the property may never become a successful operating unit.

The only distinction between interest during construction and rate of return is the fact that interest during construction is that portion of rate of return that arises during the period when there is no revenue out of which the investor may get any return and for that reason it is capitalized as a part of the cost of the project.

There are no prevailing rates for a loan of this nature for no such loans are ever made. The chance the investor is taking is greater before the construction is completed than after at least a temporarily successful operating period has passed. Chance has more to do with rates in a case of this nature than the security of the property to be constructed, for the greater part of such cost is labor, and if the project is not successful the security behind the loan is not what the property cost but its

junk value. All labor cost is lost and added to that loss is the labor necessary to salvage the material.

But, even should it be argued that current rates should be used, what is the current rate for such a project? The project of the Cities Service Gas Company is long past the stage of promotion and speculation. The Commission says its earnings are excessive. The Commission's engineer says the property is in such condition, both as to lines, gas and market, that it cannot be criticized. Yet the bonds of this established project are now selling for a price that will bring in a return of 11%. If such is the criterion by which interest during construction should be judged, certainly 8% is reasonable and 6% is entirely unreasonable.

We submit that Hamilton's use of 8%, being corroborated by all other witnesses in the case, including the Commission's witness, Montgomery, this court must find that the necessary capital to construct this project could not be attracted at less than 8%, and that 8% is the proper rate to use for this item.

This item is subject to correction for overheads as hereinbefore stated at page 48 of this brief.

Going Concern Value.

The evidence before the Commission consisted of the testimony of Hamilton who valued this item at $8,898,532 (R. 443) and the testimony of Black who valued the item at $3,820,000 (R. 443). The Commission in its finding disregarded the testimony of both engineers and used an arbitrary figure of $2,000,000, which is included in the valuation found. The court below increased this allowance to $5,000,000.

It is argued in appellant's brief that a smaller allowance should be made for going value in the case of a company engaged in the production, transportation and sale of natural gas than should be allowed in the case of utilities generally. The reasoning back of this argument is that the Pipe Line company, being engaged in the business of supplying distributing companies at the city gate found the business already in existence; and that all that had to be done was to make a connection at the city gate of the distributing company. This argument is fallacious for many reasons. For the purpose of discussing this phase of the question, we propose to divide the distributing companies into four different classes, and consider them from the standpoint of common knowledge and experience.

First, distributing companies in towns which have at some time in the past used natural gas and where the customers therefore may be supposed to have some familiarity with its benefits, but who because of the loss of natural gas facilities have a considerable skepticism about again equipping their houses with natural gas burning appliances.

Secondly, those towns where natural gas was being supplied from another source at the time of the construction of the pipe line under consideration.

Third, those towns being supplied with manufactured gas service, and

Fourth, those towns which had not up to the time of the pipe line's being constructed had any gas service.

After careful consideration of these four classes it will be found that sales do not come to the pipe line like Mr. Bryan's "million men springing to arms overnight." The pipe line has no draft to replace the customer's failure to volunteer. Certain towns in which gas is being

supplied by the Cities Service Gas Company pipe line such as St. Joseph, Missouri, had had experience previously with natural gas. Their supply had failed due to the financial or engineering inability of a predecessor company to maintain a line across the Missouri River. The town had been left without heat on several occasions. Whatever investment the customer had in heating appliances was lost, and he had thereafter used artificial gas for a period of ten years or more, for cooking and either coal or oil for his heating requirements. A moment's thought will convince anyone that it would take a long time to build the load up to what should be the normal heating load in a town which had passed through such an experience. It also would be a waste of investment to build a pipe line to the town to supply only the needs indicated by the quantity of artificial gas sold and at a later date have to replace that pipe line with a larger one to take care of the volume of gas which represents a normal natural gas heating load.

Let us now consider class two, where a town has been educated to the use of natural gas supplied by another company. One of two things must necessarily follow: If this present company is to secure this business, it must be because of a willingness to make price concessions, or secure the business through very superior salesmanship or because the service from the other company has been very unsatisfactory. If the service from the other company has been very unsatisfactory, there will be the same long period to go through in the restoration of such confidence on the part of the customer as will result in his investment in the amount of natural gas heating equipment which will permit him to burn a normal amount of gas under good service conditions. Under the other two conditions, price cuts or superior salesmanship, the

acquisition of the business will require long negotiations and expenditures of much time and intelligent effort.

In the consideration of class three (an artificial gas distribution system), the attempt to supply that town with natural gas brings the owners of the distribution system immediately face to face with the proposition that the large sum which they now have invested in their artificial plant becomes not used and useful property, and we know of no one who can cite any particular case where stockholders have greeted this proposition with any applause. It will require long negotiations with the city council and the distribution system owners before even a contract can be made.

It next will require a period during which the distributing company must expend money to increase the size of its mains which have been fully adequate to supply the amount of artificial gas burned, but which are entirely inadequate to supply the quantities of natural gas that will be burned. It is naturally impossible to sell natural gas househeating appliances until such time as the pipe line is connected to the distributing system and natural gas is available and it is equally impossible to have all of the customers at once buy househeating equipment. It takes a period of several years to reach the normal saturation of house heating installations from the standpoint of a natural gas supply, when natural gas is taken to a town previously supplied with artificial gas.

In the consideration of class four, it will be recognized that if no gas at all has been served previously to the arrival at the town border of the pipe line, a company must be formed, a distribution system must be designed, financed and built, customers attached and equipment sold to those customers for the utilization of gas. In all of these cases engineering and sales talent must be

supplied to the distributing companies by the pipe line company, for one or more of several reasons; first, because there being no previous company there is no personnel familiar with the problem connected with the sale of natural gas, for even the artificial gas men's viewpoint must be directed to house heating and they must be educated as to methods and equipment necessary to get the required volume of natural gas sales.

In a town previously supplied with natural gas and where the supply had failed, there must be a large amount of sales effort on the part of the pipe line company to convince customers that this present pipe line will give adequate and continuous service before they will make their investments. This is something the pipe line must and the distributing company cannot do. To any except the very largest cities only one pipe line is built and this forces the pipe line company to spend money to facilitate the acquisition of the load as rapidly as possible because of the penalty they are under from the excess investment which they have up to the point where the load reaches the amount of gas for which the pipe line was designed, such design being based of course on the normal consumption of natural gas per customer.

The appellant has quoted in its brief the following testimony by Hamilton in an effort to contest the allowance by the court below for going concern value:

> "Q. Do you mean to say, Mr. Hamilton, that every plant of the same value should have the same allowance for going value? A. No, because there would be a very different allowance between your pipe line plant or your distribution plant or an electric plant or something like that. There might be a wholly different basis.

Q. For instance you take the distribution plant, take the one here in Topeka, for example A. Yes, sir.

Q. If you assumed that you would reproduce it now, and it had no customers, it would mean you would have to attach in that case, thousands of customers before the business was established? A. That is true, and 10 per cent allowance in that distribution plant would not be sufficient, in my judgment.

Q. Then take a pipe line company like this, and the number of customers you have is not very large, very many involved, don't exceed three or four hundred? A. That is true.

Q. That should be taken into consideration in arriving at the Going Value in this case? A. That is true."

In this testimony Hamilton said: "Different plants would have different allowances for pipe line plant, distribution plant or an electric plant * * * There might be a wholly different basis." Following that counsel by accident or otherwise chose one of the four most profitable distribution centers of the line from among 135 on which to base his question to which Hamilton replied "a 10 per cent allowance in *that* (italics ours) distributing system would not be sufficient in my judgment." A ten per cent allowance for going concern value even on the Commission's valuation would amount to $6,930,000.00, but on the above testimony the appellants are endeavoring to reduce the court's allowance which was only $5,000,000.00. The appellant then goes on to quotations from the testimony such as the following:

"Jarboe, superintendent of all pipe lines of the system, testified that the line to the Amarillo field was constructed for the purpose of taking care of the present demand of the pipe line system.

Hamilton testified:

'Q. The line from Amarillo to Wichita, that as I understand, when it was built, was built for the purpose of taking care of the demand for gas you had at that time? A. Yes, sir.'

Mr. Eastman testified as to the Amarillo line from Texas to Wichita and Ottawa:

'Q. Now this line was built to Texas; was any addition to the market procured from that line, were any additional markets procured, any new customers? Are there any connected to that line between Texas and Wichita? A. No new cities; there may be a few small towns along that line served, but they are inconsequential.'

'Q. Was there any other purpose than to supply existing markets?' A. No.'

From the above testimony, appellants argue that there is no delay in attaching business. However the addition of the following testimony (R. 451) must be connected with the above testimony as to certain specific lines to get the complete history of these lines:

"Q. The line from Amarillo to Wichita, that, as I understand, when it was built, was built for the purpose of taking care of the demand you had for gas at that time? A. Yes, sir.

Q. You already had the demand for gas, and the Amarillo line was put in for the purpose of taking care of the demand at that time, that had already accumulated? A. To take care of it, based on the disappearing supply with which we had previously been taking care of it.

Q. I understand that, but the Oklahoma line was built (fol. 525) to take care of a demand that you then had for gas? A. Yes, it was with the idea of supplying ourselves with gas at a cheaper price than we had been forced to pay, otherwise, before this field came in.

Q. You already had the demand for the gas? A. Yes, and we already had a source of supply, but this was a cheaper source."

The present towns are being supplied with gas from fields that were not in existence until many years after the beginning of natural gas service to these towns. Fields have come in, pipe lines have been run to them, the fields have declined, then disappeared, new fields have been connected and the pipe lines to the old fields have been taken up. It is a constant program of change in the case of a company as large as the one under consideration. The fact that these particular lines have been built to replace a supply which previously had been taken from other fields and which was rapidly declining or that they had been built to replace an expensive gas supply with a supply at a lower cost, has no bearing whatever on either the cost of attaching the business to the pipe line or on the value above the physical property value which a willing buyer would pay a willing seller for that business so attached.

If a pipe line has been in existence for years with business attached and a history of profitable operation behind it, that pipe line has an admitted going concern value. If then that pipe line is replaced with another by reason of the failure of the field to which the first was connected, what then becomes of this admitted going concern value? It can truly be said of the second line, as appellant argues, that it was built to an existing market. But that is an entirely different matter from saying that the second has no going concern value. It has, in fact, all the old line had and more too, because it now has a real gas supply behind it.

Instead of the percentage allowance for going concern value being less in the case of the Cities Service Gas

Company than in the case of a usual utility as contended for by appellant, we insist that the reverse is true. The ordinary utility servicing the inhabitants of a city is a self-contained unit. It either manufacturers or purchases the commodity which it distributes and sells and its operations are more simple, its operating force being merely that required to keep its machinery and plant in proper condition.

On the contrary, the plant of the Cities Service Gas Company and its organization is most complex and its problems such as to require the greatest foresight on the part of its operating officials and the greatest coordination between the different units making up the system as a whole. In the first place, available markets had to be studied and analyzed to determine whether they were such as would make the project economically feasible. After that was determined, it was necessary to acquire an adequate supply of gas to supply the system because in the absence of such supply the system would have no value whatever.

Not only would such supply have to be procured originally, but throughout all the years the company has been in operation it had to be maintained and guaranteed not only for the present but for the future. In addition to all this, the various sources of supply attached to the system had to be so coordinated that all cities served should at all times have an adequate supply of gas. The plant of the Cities Service Gas Company is not a single unit but consists of one unit whose duty it is to procure and maintain a supply of gas, another unit whose duty it is to maintain the system in proper operating condition, another unit whose duty it is to dispatch the gas through the system and regulate pressures and supply to all cities without regard to their location, and another

unit whose duty it is to see that sufficient gas is sold to produce earnings for the requirements of the company.

The Cities Service Gas Company now has and for years has had an organization which functions efficiently as to all of these various operations. This organization keeps in touch with the present and future requirements of all cities attached to the transportation system and plans with them for their present and future needs. Without this organization, failure of service would result just as it did result some years ago before the different pipe line companies now composing the transportation system came under the present ownership and were coordinated, and before there was an over all organization looking at the problems of production and consumption from the viewpoint of both the producer and the consumer. If the plant of the Cities Service Gas Company were to be reproduced as of September 1, 1931, none of this organization would be in existence. There are few men trained in the natural gas business and capable of becoming members of the present organization, and it would require years of time and an infinite number of costly errors before an organization such as the present one could be assembled and before the resulting service to consumers would reach the state of perfection now admitted.

The investors in the old Kansas Natural Gas Company lost many more millions of dollars than we claim for going concern value because they did not have such an organization.

What, then is the value of this organization, and what should be allowed for going value in this respect. What also is the value to the company of having markets attached which are developed to such an extent that the use of gas has doubled or trebled its use in the artificial

gas days. Without either the organization or the market, the whole project would be a failure.

We are not attempting to place a specific value on these items for obviously that can not be done. We do state however, that the argument of counsel that the going concern value which should be allowed in this case is less than the allowance that should ordinarily be made to a public utility, consisting of one self-contained unit, is ridiculous.

In addition to the remarks we have made as to the value of the present organization from an operating and service standpoint, we also desire to emphasize the great saving in operating expenses which has resulted from the consolidation of the former separate units into the present system. Prior to the time the present owner acquired the property now under consideration, the system consisted of several unrelated and separately operated units the principal of which were the Kansas Natural Gas Company, the Wichita Natural Gas Company, the Wichita Pipe Line Company, the Marnet Mining Company, the Quapaw Gas Company, the Kansas City Pipe Line Company and the American Pipe Line Company. Each one of these companies had its separate officers and operating organizations instead of the one organization now operating all of them.

The Commission allowed $2,000,000.00 as the entire going concern value to which the company is entitled. We have no hesitancy in saying that the operating expenses of these combined companies including salaries to executives have, by reason of their consolidation, been reduced more than $200,000.00 per year. A saving of $200,000.00 per year in operating expenses if capitalized would be equivalent to $2,500,000.00 going concern value at a rate of 8 per cent.

During 1928, 1929 and 1930, several large natural gas projects were built. It is a matter of common knowledge and court record that several of these projects are now in the hands of receivers, although the lines were designed by the best engineering firms in the United States, were connected to a plentiful supply of gas, and ran to cities with large populations.

The principal reason of their failure was an inability to connect customers at a time when coal and oil, the two competing heating fuels, were selling at the lowest price within recent history, and therefore natural gas had no price advantage to offer from the standpoint of operating cost to the householder, and, secondly, the resistance on the part of the householder to the necessary expenditures for gas heating appliances during a period of great depression.

Those lines have the same type of pipe and compressor stations as the company under consideration and have an adequate supply of gas, but are failures because of the lack of connected load. Therein lies the difference represented by Going Concern Value. It is the difference between physical property ready to operate and not operating and the same physical property with a normal load connected and operating. This difference is insurance that the tremendous expenditures for gas acreage, pipe lines, compressor stations, et cetera, can be made to earn a return and we believe that it is an obvious fallacy to argue that a factor that gives that insurance to eighty or more millions of dollars of property should have a value as low as $2,000,000.00.

Assuming that the other lines referred to above should weather the depression and should at a later date succeed in connecting the load for which they were designed, the loss of return for one year on an $80,000,000.00 property,

due to the failure to have a connected load, would alone amount to $6,400,000.00. The depression has already lasted *four* years and may last longer so that the company under consideration has had a return of $25,000,000.00 above what it would have had if the item of going concern value had not been present in the property at the beginning of the depression.

During this period of depression, prices of labor and material are obviously low and a determination of the value of physical property as of that time naturally results in a valuation being found lower than that which would be reached if the determination was made during a period of prosperity; however, going concern value differs from this and particularly so in regard to a utility rendering natural gas service, the utilization of which is predicated on large expenditures on the part of the customer.

This is obvious because if a pipe line company were to attempt to attach customers during a period of depression it would meet an additional sales resistance caused by the disinclination of the public generally to spend money for new and different household equipment. Customers attached with houses equipped for the utilization of natural gas furnish a going concern value higher in a period of depression than in periods of prosperity due to the increase in the difficulty and therefore the cost of creating that going concern value during such a period.

The brief for the appellant gives considerable space to the question of interest during construction for which the court allowed 6 per cent and the difference between that amount and the 8 per cent which was found by the court below to be a return within the zone of reason. It is contended that 6 per cent for interest during con-

struction is ample because of the ability of a person or persons with credit to borrow money for construction purposes at that rate. Having by their argument contended for 6 per cent as the amount to be allowed for interest during construction they object because the court below included an additional 2 per cent under going concern value, to recompense that person or persons for the risk which they took in putting their credit back of the project.

They make no suggestion as we see it as to the proper place for the inclusion of this item for risk and their brief necessarily leads to the conclusion that that person or persons who supply this necessary credit are to go without any compensation at all. This would predicate the construction of future pipe lines on the willingness of philanthropists to devote their funds to the realm of speculative investment.

The appellant further devotes a considerable portion of its brief to a discussion of the court's inclusion of an item to cover the depreciation of that portion of the plant which is idle during the process of attaching business. In our estimation, this is directing their discussion to the cost of attaching business which may or may not have any relation to the value of the business after it is attached. The question before the court is the question of the value of the business attached and we have directed our discussion to that value.

Hamilton, who testified to a value for this item of $8,898,000, was, as is shown by his testimony as to his qualifications, occupying a position where for years he had had charge of purchase and sale of a large number of properties and his determination of the going concern value of the Cities Service Gas Company property was

based upon his experience and represented his judgment of the value which a willing buyer would pay and a willing seller accept over and above the value of the physical property of the system. That judgment was not affected by his knowledge that predecessor companies had spent many millions more than his allowance in endeavoring to create this going concern value.

In the foregoing discussion, we have undertaken to list merely a few of the elements entering into going concern value as applied to the property of the Cities Service Gas Company which are not common to utilities generally. We will now discuss briefly the usual allowance made by courts and commissions for this item.

In the recent case of *Denver Union Stockyards Company* v. *U. S.*, 57 F. (2d) 735, the three-judge court which had the matter of going concern value under consideration in its opinion gives a tabulation citing six recent decisions of this court, the value of the properties involved, the amount allowed for going concern value, and the percentage such allowance for going concern value bears to the value of the property. This table is as follows:

	Cost of Reproduction	Amount Allowed for Going Concern Value	Per Cent of Going Concern Value to Cost Reproduction
Knoxville v. *Water Co.*, 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371.	$ 538,000	$ 60,000	11.1
Omaha v. *Omaha Water Co.*, 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084.	5,700,583	562,712	9.9
Denver v. *Denver Union Water Co.*, 246 U. S. 178, 38 S. Ct. 278, 62 L. Ed. 649.	10,617,782	800,000	7.5
Georgia Railway v. *R. R. Comm.*, 262 U. S. 625, 43 S. Ct. 680, 67 L. Ed. 1144.	5,250,000	441,629	8.4
Bluefield Co. v. *Pub. Serv. Comm.*, 262 U. S. 679, 686, 43 S. Ct. 675, 67 L. Ed. 1176.	324,428	32,442	10.0
McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316.	14,904,000	1,366,000	9.17

This court, in the case of *McCardle* v. *Indianapolis Company*, 272 U. S. 40, said:

> "The evidence is more than sufficient to sustain 9.5 per cent for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that 10 per cent of the value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account."

It is apparent from the testimony of Black with respect to the matters taken into consideration by him in fixing the allowance for going concern value that he did

not take into consideration the matters we have above suggested showing the difference between the going value allowance which should be made the Cities Service Gas Company and the allowance usualy made to public utilities which consist of an independent self-contained unit. His valuation of this item we therefore contend is insufficient.

In making his valuation of this item, Hamilton did not attempt to place values upon the different elements to be considered as such estimates would of necessity be mere guess work. No one can say exactly what the value is to the Cities Service Gas Company of having its existing markets attached, of having its properties under one company and under one management as against many companies with independent managements, or the value of having its production and consumption requirements coordinated as they now are coordinated. He contented himself with the rules laid down by this and other courts and took for his valuation of this item 10 per cent of the value of the physical property as he found it to be. It is our contention that even this valuation is low for the reason that allowances made utilities generally are not applicable to the property of the Cities Service Gas Company.

We submit that the Kansas Commission had no right to ignore all the evidence before it and to arbitrarily fix a value of $2,000,000.00 on this item, which is an allowance of less than 3 per cent. The members of this Commission are not presumed to be experts or to know anything about the method of arriving at such valuation. If they were such experts or were supposed to exercise their own independent judgment without regard to the evidence there would be no purpose in introducing evidence at all.

In addition to the evidence introduced before the Commission, appellees employed the firm of Ford, Bacon and Davis, Inc., nationally-known engineers, to make an investigation and study of the property of the Cities Service Gas Company and its history for the purpose of determining a proper allowance for this item. Such a study was made and in the court below it was stipulated as follows:

> "It is further stipulated that the witness James A. Emery will testify that he is vice-president and director of Ford, Bacon and Davis, Inc., engineers; that he was employed by the complainants herein to make a study of the property of the Cities Service Gas Company for the purpose of determining the proper allowance for going value and that in the opinion of said witness going value should be allowed in a sum between eight and a half and nine million dollars."

The court below therefore had before it as the only evidence in the case, Hamilton's testimony to a value of $8,898,532.00, Black's testimony to a value of $3,820,000.00 and Emery's testimony to a value of between $8,500,000.00 and $9,000,000.00. On this evidence, it is our contention that appellees were entitled to an allowance for this item in an amount much exceeding the $5,000,000.00 allowed by the court.

Gas Leases.

With respect to gas leases, the court below said in its opinion:

> "The commission held that certain gas leases claimed to be held by the Cities Service Gas Company for gas reserves were in excess of the required

reserves, and that they were in fact being held for speculative purposes. The evidence established, and we have found, that the officers and directors of the Cities Service Gas Company, who are men of broad experience in the natural gas business, in the exercise of an honest and, we think, sound business judgment, determined that such leases were necessary to afford it an adequate gas reserve, and that such leases were acquired and are held by it as bona fide reserves, and not for speculation.

The commission was not empowered to substitute its judgment for that of the officers and directors of the Cities Service Gas Company as to the amount of leases necessary to afford an adequate gas reserve, in the absence of a showing of abuse of discretion by such officers in that regard. *Southwestern Bell Tel. Co.* v. *Public Service Com.*, 262 U. S. 276, 289; *State Public Utilities Com.* v. *Springfield Gas & Elec. Co.*, 291 Ill. 209, 234, 125 N. E. 891; *People* v. *Stevens*, 203 N. Y. 7, 96 N. E. 114, 117; *Idaho Power Co.* v. *Thompson*, (D. C. Ida.) 19 F. (2d) 547, 580; *Kansas City K. V. & W. Ry. Co.* v. *Bristol*, 101 Kas. 557, 167 Pac. 1138, 1140; *Denver Union Stockyard Co.* v. *United States*, (D. C. Colo.) 57 F. (2d) 735, 748."

The finding of the court as to gas leases is as follows:

"*Gas Leases.* The company owns the gas rights in about 1,202,000 acres, excluding 59,000 acres bought for the Texoma Company, in which the Cities Service Company is interested. Of these, 42,297 acres are developed; 196,170 acres are proven; 25,607 are in probable territory, and 998,287 acres are classed as of prospective value only.

Many experienced witnesses, testifying for the plaintiffs, valued these leases at figures, the average of which is $12,914,189, of which $1,996,574 represents the 998,287 prospective acreage. Mr. Holl

testified for the Commission as to values; he was a practical geologist and oil man with no personal knowledge of the fields in question, and no particular experience with gas leases. His testimony was predicated on a trip he made to the fields for the purpose of testifying, and inquiries made on that trip. He valued the leases at about one-third of the company's value. The Commission valued them at $6,279,237, of which $998,287 was for prospective acreage. The Commission valued the Amarillo holdings at $4,281,894; the Hugoton holdings at $556,116. The cost of the leases, after deducting those bought for the Texoma Company, was $5,727,272.

The Commission excluded all but 71,267 acres from the rate base. The holdings of the company at Amarillo alone are 94,820 acres. The acreage allowed is valued by the Commission at $2,874,390. The Commission arrived at this result by finding the amount of gas left in the Amarillo holdings, based upon the estimate of geologists; it deducted from the company's requirements, gas now being purchased by the company from other producers; and found that the gas in the acreage allowed would serve the customers for twenty-two years.

The Commission found that the remaining leases were acquired for speculative purposes, a finding based upon one fact: the Texoma Company was formed by the Cities Service Company and other interests to build a pipe line to eastern states; leases were acquired by the Cities Service Gas Company for its affiliate, and later transferred to it. On the other hand, in this court, is the uncontradicted sworn statement of responsible officials that all the acreage was acquired as gas reserves for this pipe line. There is also the significant circumstance that not a single lease, acquired for that purpose, has been sold. We hold, therefore, that these leases were acquired, and are held, in good faith, for this pipe line, and that the finding that

they are held for speculative purposes is contrary to all the evidence.

We further find there was error in eliminating these leases from the properties of the company because the company is now contracting some gas, and conserving its own. The first duty of the company is to see to it that its patrons have an adequate supply of gas. To insure this, it must own the gas. Contracts for gas are well enough when gas is plentiful, but when the shortage comes, contracts are not adequate safeguards. Broken contracts will support verdicts for damages, but they will not heat the houses nor cook the breakfasts of the patrons in Kansas. The company has not only the right, but is under the duty, to own enough gas to meet the needs of its customers.

Who shall determine what reserves are adequate? A commission, with no moneys invested, or the owners of this pipe line which, without gas, is worse than useless? Within the limits of reason, undoubtedly that determination must be left with the owners. Perhaps they have been over-cautious, but if error is to be made, it should be on the side of ample reserves. The owners of this property had seen the gas exhausted from field after field; they had seen their customers lost because the supply had failed; they had seen fields of great promise belie their expectations. They had seen geologists wrong before. In recent years, they had seen the state prorate the taking of gas. The Commission's figures are predicated on a 20 per cent recovery; within two weeks of its order, the Texas Railroad Commission cut this to 4 per cent. What the future may hold, by way of state action, no one knows. We cannot say the owners did not, in good faith, acquire this acreage to protect their great investment and to insure their patrons a dependable gas supply. They invested around $4,500,000 in 200,000 acres in proven or probable territory, and about a million more in a million acres in prospective territory. Upon this

five and a half million investment depends the entire value of $75,000,000 of pipe lines and many more millions in the properties of affiliated distributing companies. The Hugoton field is not now connected with the pipe line; but it is a field of great potential supply, is favorably situated, and the investment therein is not large. We find that all the acreage owned is used and useful in the public service.

The value of it is problematical, as is true of all gas properties. If the Amarillo field stands up, it is probably worth the value placed on it by witnesses for the company; if it stands up, then that field is adequate for the needs of twenty years; it may not stand up, and the company acquired Hugoton and other acreage against that eventuality; if it does not, it is not worth so much. Its value depends upon a future market, and on the actions of state commissions. The overwhelming weight of the competent evidence sustains the valuation of the company, around $12,000,000. That is about twice its cost. For the purpose of this case, and upon the authority of *United Gas Co. v. Railroad Commission*, 278 U. S. 320, we have put the gas leases in at cost. The figure is arrived at by subtracting from the cost of all the leases, the cost of those transferred to Texoma, which leaves the cost of those now held."

The findings of the court are so complete and comprehensive and the reasoning of the court in its opinion is so clearly stated, that there is little we can add. We certainly do not propose any attempt to analyze the maze of conflicting figures presented by the record or the comments of counsel thereon.

In connection with the consideration of gas leases, we again desire to call the attention of the court to the nature of this proceeding, if its nature can really be determined. The Commission admits it has no jurisdiction

over the inter state rates of the Cities Service Gas Company except in determining local rates, and admits that local rates are not now in question. The Commission admits also that it cannot regulate this company engaged in inter state commerce, and it is apparent that for that reason the Cities Service Gas Company was not made a party to the proceedings before the Commission, and was given no opportunity to introduce any testimony or make any explanation with regard to its methods of doing business.

The State, represented by the Commission, is not the owner of this property, and has no responsibility with respect to the service rendered by it. In this period of unrest and general disturbance, there is no question but what a Commission responsible only to the political officer which appointed it could secure great public acclaim and approbation if it could reduce the rates paid by the residents of Kansas for gas; and it is also quite apparent that such action on its part could be used to great political advantage. At page 226 of the record appears a statement made to the Commission by an attorney representing the distributing companies, which, if this court will read, will give a very clear understanding of the situation which existed at the time this proceeding was commenced.

The Cities Service Gas Company is engaged in no business other than the production, transportation and sale of gas. It is not engaged in the business of purchasing and reselling gas leases. As the court found, there is no evidence in the record of even one sale made by the company for speculative purposes. This being true, what possible consideration would induce the officers of the company who are responsible for service to purchase needlessly leases which they would not, in their bona fide

business judgment, consider necessary for the protection of the investment and the protection of service? The procuring and holding of the leases in question involved not only their original purchase price, but involved the continuous annual rentals necessary to be paid in order to hold them, running into many thousands of dollars annually. It is the admitted purpose of the officers of this company to make money for the owners of its stock and securities. It is a corporation organized for profit, and there is no other excuse for its existence. In the furtherance of this purpose, it must have been at all times the intention of these officers to operate the company as economically as possible in order that reasonable earnings would result. It is also evident that the owners of the stock and securities of this company would not long tolerate uneconomical operation or needless expense. All of these matters must have been in the consideration of the officers of the company when the existing leases were purchased, and must be taken into consideration by any commission or court giving the matter consideration.

As we have previously stated, the Kansas Commission has no responsibility with regard to service. The tenure of office of the members of the Commission is usually short lived and entirely dependent upon politics, as is evidenced by the fact that the only two members of the Kansas Commission who signed the orders in question herein are no longer members of that Commission. It is easy for such members having no knowledge whatever of the gas business and being more concerned with their continuance in office than in service, to say that the officers of the company abused their discretion in purchasing gas leases and were overly concerned as to their responsibility for rendering service, but clearly any action taken by such Commission, if authorized under any cir-

cumstances, should be action based on the evidence in the case.

The evidence in the record before this court consists of testimony and stipulations in which are set out the judgment of the responsible officers of the company as to the necessity for these leases. There is a stipulation as to the testimony of H. O. Caster of Henry L. Doherty & Company (R. 370), the affidavit of H. R. Straight, vice-president and general manager of the company and its highest local executive (R. 497), the affidavit of Ross M. Stuntz, superintendent of production (R. 493), and the affidavit of George H. Baird, general superintendent of operations over the whole system of the company (R. 499). All of these men are operators nationally known and recognized for their ability. They each and all say that in their judgment the existing leases of the Cities Service Gas Company were purchased after the most careful investigation and for the reason that in the opinion of all such officers their purchase was necessary in order to make service certain. The testimony of these men in connection with the fact that no consideration other than usefulness could have possibly influenced their judgment is entitled to, and must be given, great consideration. This is an unregulated company which could have no possible purpose in padding its assets for rate purposes.

As opposed to the testimony of these men, there stands alone the testimony of F. G. Holl who was employed by the Commission to give the testimony which he did give. We have set out in detail in the record (R. 473-8) the qualifications of Holl with respect to the expert testimony which he gave. From this testimony it appears, as the court below found, that Holl was a practical man who, prior to his employment by the Commission, had never

been to Texas, and who knew no more about the value of leases or the necessity for them than any non expert whom the Commission might have employed. What Holl did was, to go to Texas and talk with such persons as he chose to contact for the purpose of getting their ideas on the subject. None of these persons contacted appeared as witnesses, and we do not even know that the opinions expressed by Holl reflected anything that was told him by anyone. As we view his evidence, it is the rankest kind of hearsay, and the Commission should have excluded it on the motion of the distributing companies, as set out in the record at page 477.

The only experience to which Holl testified which would, in any sense, qualify him to testify as an expert, was, that for some years he was employed in a most subordinate capacity by this very company. If, while occupying this subordinate position, Holl had had the temerity to approach the officers of the company with the suggestion that they were purchasing more leases than were necessary to safeguard service, the result can be easily imagined; but that is exactly what this man is now undertaking to do, and his testimony is the only testimony in the record which could possibly be construed as supporting the findings of the Commission that any part of the existing reserves were not necessary. Even Holl did not testify to that effect. All that he did was to produce for the benefit of the Commission a great array of figures purporting to show the amount of gas in reserve, and the Commission, using these figures and assuming that at all times the company could take from the ground through its wells a certain percentage of the open flow thereof, found that the leases were in excess of actual requirements.

The calculations made by the Commission, however, failed entirely to take into consideration any future contingencies. No consideration is given to the fact that other pipe lines may be built to these same reserves which would rapidly deplete them. No consideration is given to the fact that the reserves may be dissipated and exhausted by the practices of oil operators. And no consideration is given to the fact that state laws may be enacted which would so limit the amount of gas which could be taken from the reserves as to entirely change the Commission's calculations, based on 20% of open flow.

That the action of state legislatures in limiting the amount of gas to be taken from wells is not mere idle conjecture, we call the court's attention to the order of the Texas Commission appearing in the record at page 496, under the terms of which the takes from wells are limited to 4 per cent of the open flow. This order, as we understand it, is still in litigation; but if it should be sustained by the courts, the great reserves of the company in that state, which the Commission has found to be ample for years to come, would immediately become inadequate. That this is true clearly appears from the affidavit of Mr. Stuntz. (R. 493.)

In addition to the matters above discussed, there is another consideration which the Commission has entirely overlooked. The Commission in its opinion, and counsel in their brief assert that it is unnecessary for the company to own all of these leases for the reason that an adequate supply could be contracted from others. This argument entirely overlooks the fact that the reason for there being gas available under purchase contracts at the prices being paid is, that the major pipe line companies, such as the Cities Service Gas Company, have their own reserves which are ample for their requirements. If it

were not for these reserves, and if the major pipe line companies were dependent upon producers not associated with them in any manner, such producers taking advantage of the pipe line companies would fix the price of gas at such a figure as would make it impossible for the present rates to local consumers to be maintained. It is only the fact that the companies have these reserves which make these prices possible.

At page 91 of appellant's brief, the statement is made:

> "This is not saying that the officers are to be criticized for purchasing these leases, nor is it contended that if the time ever comes when said gas leases are in fact devoted to the public use, they should not then be included in the rate base on which to determine a rate."

In support of this statement, several cases are cited, where property owned by a utility but not then used was excluded from the rate base. Those cases, however, were rate cases in which the Commission was exercising its right of regulation, which does not exist in the case at bar.

The thought which must immediately suggest itself to anyone reading the above statement of counsel is, if the officers of the company are not subject to criticism by reason of having purchased these leases (which is equivalent to saying that they exercised their bona fide business judgment in purchasing them), where is the money to come from for the purchase of these leases and for the payment of annual rentals necessary to hold them. The company is engaged in no business other than the sale of gas. It has no income except from that source. If the officers are not to be criticized for having purchased the leases and if it was proper for them to purchase the same,

how are they to be paid for? If the above argument of counsel for appellants is carried to its conclusion, it is equivalent to saying that the officers are subject to criticism and for that reason the leases should be abandoned.

A further thought which suggests itself in connection with this argument is, that if the leases should be included in the rate base at the time they become useful, at what figure are they then to be included? These leases, or many of them, were purchased years ago, and have been held by the company through the intervening years at great expense. The reason for this is, that when a gas field is discovered, leases must be immediately purchased if they are to be purchased at all at a reasonable figure. Should the reserves of the Cities Service Gas Company, or any other similar company, become inadequate in any year, that fact would immediately become known, and everyone owning leases would immediately become advised that the company had to have leases, regardless of the price, as without a gas supply its entire investment would be lost. If, under these circumstances, the company should enter a gas field and undertake to purchase leases on a large scale, it would have to pay prices entirely out of line with the present value claimed for the leases which it owns, and the rate base when that time arrived would by reason thereof be much greater than the rate base now claimed. The reasoning of the Commission and its attorneys is based on the assumption that these leases are only necessary for future use. The consideration is entirely overlooked that many of these leases now in use were for many years held as unproductive and for use in the future, which future has now become the present.

We submit that in a proceeding of this sort where no power of regulation exists as to a company engaged in interstate commerce, the Commission is without power or authority to substitute its judgment for that of the officers of the company in the absence of a clear showing that the judgment of such officers is not bona fide.

As to the value of the leases constituting the reserves of the Cities Service Gas Company, the evidence consisted of the testimony of 10 witnesses who were chosen because their experience made them thoroughly familiar with such values. The substance of the testimony of these witnesses is set out in the record at pages 464-468. These witnesses, with one exception, did not attempt to fix values by speculating as to the amount of gas in reserve and the possible market for same or the prices for which such gas could be sold in such market. They were men who had bought and sold leases in the various fields, and who were familiar with the present market value of such leases. We will not undertake to analyze this testimony, or to state anything further with respect to their qualifications, which are well stated in the record, to which we have referred the court.

As opposed to this testimony of disinterested men most qualified to testify, is the testimony of F. G. Holl, the man sent by the Commission to visit various fields of which he had no knowledge for the purpose of forming an opinion from conversations picked up on the street.

On this record the court below found the overwhelming weight of evidence to be that the present market value of the leases of the Cities Service Gas Company was $12,000,000.00. The court did not, however, include the leases in the rate base at this figure, but at their actual cost to the company of $5,727,272.00. This, the

court did on the authority of *United Gas Company* v. *Railroad Commission,* 278 U. S. 320. As we read this case, this court adopted cost as against present market value for the reason that the present market value was not properly established. It was with this case in mind that the appellees procured witnesses who were qualified to, and did, testify positively as to present value based on actual purchases and sales. We believe that this testimony is clearly distinguishable from that in the case relied upon by the court below, and that the court should have added to the rate base $12,000,000.00 for leases instead of the cost figure which it did add.

We desire to refer briefly to the authorities cited by appellant in support of its contentions regarding gas leases, to point out their inapplicability to this case, and to call attention to the misinterpretation of counsel as to the holding of the court in the respective cases and the reasoning behind such holding.

The first case cited is that of the *Spring Valley Water Company* v. *San Francisco,* 165 Fed. 668. This was a case in which the rates to be charged by the Water Company were the matter under consideration, the Commission having jurisdiction to determine such rates and jurisdiction to regulate the company, which is not the situation in the controversy at bar where the Commission has no such power or jurisdiction. Further, the property in this case which was claimed not to be used or useful was land bought for some future construction purpose and which since its purchase by the company had appreciated from a cost of hundreds of thousands of dollars to millions of dollars. The court said the company should be satisfied with this bargain without including the land in the rate base. It must be borne in mind that this land had no purpose other than any

other land in any other location which the company might have bought. It was not purchased because it contained water necessary for present or future use, but solely as the location of some future dams and aqueducts. This land or dam site could have been immediately sold without in anywise affecting the company's present or future ability to render service. Another location could have been purchased when its use became necessary. In the case at bar, gas reserves were purchased only for the reason that reserves were necessary to guarantee immediate service and service over the immediate future, and were purchased and accumulated into a reserve at the only time they could be acquired. The company could not dispose of these leases now and subsequently repurchase them or similar leases at anything like the values now claimed. The present situation is entirely different from that under consideration in the case cited, and the case has no application to the present controversy.

The next case cited is that of *Acquaokanonk Water Company* v. *Board of Public Utility Commissioners,* 100 N. J. L. 169, and is another case in which a water company, whose rates were properly under investigation and whose operations were subject to regulation, purchased a site for future use. All that we have said with respect to the Spring Valley Water Company case is equally applicable here.

In the case of *Chesapeake & Potomac Telephone Company of Virginia* v. *Commonwealth,* 136 S. E. 575, the telephone company purchased a corner lot in the city of Richmond upon which it contemplated erecting a building in the future. The lot had nothing whatever to do with present service or with guaranteeing future service. The company could at any time sell this lot

and purchase another or purchase any one of thousands of buildings in the city which could be made to serve its purpose. Since any one of these corner lots could be purchased at that time in the future when its use became necessary, there was no reason for burdening the operating expenses with the carrying charges up to the time when the use of the lot became necessary. If the Cities Service Gas Company were now claiming that there should be included in the rate base a lot which it had purchased with the expectation of erecting a building thereon at some time in the future, this case would be applicable; but it certainly is not applicable to gas reserves in connection with the purchase of which counsel state the officers of the company are not to be criticized, because of the fact that gas reserves are available only when and as gas is discovered.

The next case cited is the *Grangeville Electric Light & Power Company*, P. U. R. 1922 D, 513, and is merely the decision of a state commission, unworthy to be cited to this court and not now worthy of our comment. However, in this case a dam was built with a capacity in excess of the needs of the customers attached. Since the dam capacity is a continuing item, the excess capacity would never become used and useful for the present number of customers, and must have been built in the expectation of the addition of other and different customers. This is directly contrary to the reasons on which the reserve leases were acquired for the Cities Service Gas Company. Those reserves are necssary for the continued service to the present number of customers attached to the system.

The next case cited is that of Columbus Gas & Fuel Company, being a decision of the Public Utilities Commission of Ohio. The order of the Commission in this

case was reversed by the Ohio Supreme Court, and, as we understand, an appeal therefrom is now pending in this court.

The case of *City of Erie* v. *Public Service Commission*, 278 Pa. 512, 123 Atl. 471, is cited and quotations are made from the opinion by counsel for appellant. We believe this case in point on the questions here presented, although it was a case where rates were involved and the company concerned was clearly subject to regulation by the state commission. We know of no case where a court has given more careful consideration to the question as to whether cost or present value should be applied to gas reserves in determining a rate base; and if the reasoning of the court in this respect is right, as we believe it is, the court below was clearly in error in putting into the rate base gas reserves at their cost of $5,727,272.00 instead of their present value of $12,000,000.00. The court in this case also gave careful consideration to the question of leases used and useful in the public service as distinguished from leases held in reserve; and we believe counsel for appellant have entirely misconstrued the opinion of the court in this respect. As we read the Erie decision, its reasoning approves the allowance of all of the gas reserves of the Cities Service Gas Company in the rate base at their present value. Clearly, counsel is in error in stating that

> "* * * the main controversy was over gas holdings, which were included in the rate base at a valuation nearly $6,000,000.00 lower than the lowest estimate of their value shown by the testimony in the case." (Appellant's brief, 134.)

What the court says in its opinion is, that the lowest value placed on leases under the evidence was $11,212,-

000, and that the Commission allowed only $5,500,000. The difference between the evidence and what the Commissi allowed was, as counsel state, nearly $6,000,000; but this finding of value by the Commission was not approved by the court, but was expressly disapproved in the following language:

> "The Commission must in some measure be controlled by the evidence before it. An order is not in conformity to law if based on reports not offered in evidence and not the subject of cross-examination. *Pennsylvania R. T. Co.* v. *Public Service Commission,* 78 Pa. Super. Ct. 593; *Pennsylvania R. Co.* v. *Public Service Commission,* 69 Pa. Super. Ct. 404, 411. A finding without evidence is arbitrary and baseless (*Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185) and a mistaken conception of the legal effect of evidence is equally fatal."

We consider this decision so well reasoned on the issue of whether the Commission in the case at bar should have excluded any part of the reserves as not used and useful, on the issue as to whether cost or present value should be used, and on the issue as to whether the carrying charges on all leases are properly chargeable as expense items, that we desire to quote from the decision at length.

> "In ascertaining what part of the value of the gas lands not presently in service should be included in the rate base, we must consider the purpose for which the additional holdings were acquired and the physical characteristics unique to this class of lands. There may be something inherent in the land, its peculiar qualities, or the use

that differentiates this from other properties. We may assume these properties were acquired for the interest and benefit of the rate-payer, as well as the company. Gas is a fugitive substance; it has no fixed situs; when drawn from one well it may come from any part of the territory, as it flows from one well or piece of land to another. When gas escapes to other fields, the former owner's title is lost. As each year's use diminishes the supply, so one part of the tract becomes exhausted, and the entire field related thereto may be exhausted. Gas sometimes lies in a pocket in a known gas field. In this it differs from coal, ore and other minerals, and is more like oil. There is no means of reproducing the product when once taken from the earth. The company gets only the gas inclosed in the reservoir, and there is no known means of determining the quantity inclosed therein. Like many utilities, its strategic, so distinguished from its monopolistic, position in its chosen field may be an added circumstance, not only as to value, but how much should be included in present value. While productivity may be considered, its place is and should be in value, and the market or present value should, and as we read the evidence did, take in these conditions. Because of these qualities, while it may be possible to presently determine the value of the lands, in fixing the probable proportionate amount of future life of the entire tract applicable to used, useful and fair reserve, it may be, and no doubt is, impossible to delimit it with any degree of certainty, either in acreage or value. There can be no graduated values of gas lands fixed as a rate base under any theory presented to us that will consider property presently used and a descending ratio until exhaustion appears that is not the result of a pure guess. Beyond that proportion of the lands reasonably necessary to the company's life, the rate-payer should not be required to assume the remainder as a burden. Though this may

be difficult to determine, the Commission, acting as an administrative body in each case, must decide the question, as in all other matters subject to the right of appeal.

"One thing of importance must not be lost sight of. Whether the gas lands be valued or considered on a reservoir or acreage basis, the gas is not paid for as gas until it is brought to the surface and used. In addition to the fair return on the rate base as found, there is added payment for the corpus of the estate taken away, or gas that is taken out, used and cannot be replaced. This is taken care of in an allowance for 'depletion.' The fair return on the rate base is a fair return to the company for the money invested. It does not include any sum to repay capital outlay; it only pays for the use. This must follow, for a *reasonable part of the gas holdings not being presently consumed but essential to the future life of the company, the carrying charges with incidentals should be allowed in the rate.* We know of no more equitable rule for the amount to be fixed as its rate base, certainly one fraught with less difficulty, than the present value theory adopted by the courts. It applies with equal fairness to the consumer and to the company; for if these lands may be disposed of to others at present value, the owner should not be denied compensation on a similar basis. These charges are of the same character as those embodied in what is known as fair return. The consumer not paying for the product until actually removed is not paying for what some one will later pay. The purpose for which the lands are bought must be fairly essential to the life of the business.

"Suppose we adopt the theory of original cost as to these lands; it would be just as incorrect fundamentally as that of present value for the complaint is against paying any return on the value of what will be used in the future. If, as stated, original cost includes all gas lands, we meet the

difficulties mentioned in another part of this opinion, wholly unfair to the owner, as well as consumer, where that cost is exorbitant. In new fields of unknown duration, suddenly developing a large output, the highly speculative feature of these lands is well known. 'The purchase of additional gas rights,' treated 'as operating charges,' places on the present day consumer an undue burden, particularly when the prices paid are high. It enables the company to recoup immediately its capital outlay. If, in addition, we carry forward the cost as a part of the rate base, or recovery is permitted through depletion, when we allow an additional return on capital already in the pockets of the owners.

"If we give no return on any value for these lands, the owner for a given number of years receives nothing for an investment upon which the life of his and the consumers' organization depends. Not until it is used is he paid, and such payment is based, under the rule, on the then present value. This value will not include compensation disallowed during the years the property stood waiting to be used. Market value is not built on any such consideration. There is no scheme advanced whereby the owner may recover the interest, other outlays, or the return on present value." (Italics ours.)

We submit that this case instead of holding, as is indicated in appellant's brief, decided the presented issues for the appellees.

In the case of *Logan Gas Company* v. *Public Utilities Commission of Ohio*, 169 N. E. 575, the Supreme Court of Ohio did, as stated by counsel, reject certain classes of leases as not used and useful, but did so on the authority of the Ohio statute, "which requires the property to be given valuation to be both 'used and useful.'"

Counsel for appellant comment at considerable length on the decision of the court in the case of *United Fuel*

Gas Company v. *Public Service Commission of West Virginia*, 14 Fed. (2d) 299. In this case the court did, as stated by counsel, eliminate from the rate base the value of certain leases which it held to be not used and useful. However, an appeal was taken to this court which resulted in the decision reported in 278 U. S. 322. As we read the decision of the court, it did not approve the action of the lower court in eliminating from the rate base certain leases as not used and useful, but included all the leases at their book value, adopting that figure for the reason that the company in question had not established any other value which was not purely speculative. The book value which the court adopted was not the original cost, such as was used by the court below for the leases of the Cities Service Gas Company on the authority of this case, but was a book value which the utility itself had placed upon its leaseholds. This value was accepted by this court as an admission against interest which in the absence of proper evidence as to present value prevented the utility from saying that its gas lands and leaseholds were being confiscated by the orders under consideration. The book value so accepted by this court was several times the original cost of the leaseholds.

We submit that none of the authorities cited in appellant's brief authorizies the exclusion of the leases which the Commission in this case excluded, or authorizes the elimination from the rate base at the present value of $12,000,000.00 found by the court below.

Hypothetical Pipe Line.

In order to meet the contention that was suggested during the course of the proceeding before the Commission that by reason of the fact the present system of the Cities Service Gas Company grew up out of the association and interconnection of previously unrelated pipe lines and was not designed and constructed as a single project, and that the system was larger than was necessary and contained duplications which would add to its value without being essential to service, the companies interested employed Ford, Bacon & Davis, Inc., a nationally known firm of engineers, to design and estimate the cost of a system which would serve the markets of the present company. These engineers, when employed, were instructed to estimate the cost of a line "as the crow flies rather than taking the actual topography into consideration," that the lines be designed as cheaply as could be done and on the assumption that the requisite gas reserves could be purchased without cornering the market.

George J. Rhodes, vice president and chief engineer of Ford, Bacon & Davis, testified as to the results of the study made by these engineers, and stated that the lowest figure for such a project was $91,500,000.00. The testimony of Mr. Rhodes is abstracted in the record at pages 333 to 338.

In their brief at page 140 counsel for appellant state:

> "The Commission upon consideration of the evidence pertaining to the hypothetical line was of the opinion it should be given no weight because in preparing the hypothetical pipe line no consideration was given to the fact that 50 per cent of the pipe line company's supply of gas was obtained in Kansas and Oklahoma, near the market, and because of the failure to give consideration to local gas."

We desire the Court to understand, in order that it may fully appreciate the consideration which should be given to this testimony, that these engineers were not employed to make a guess or an unfounded estimate based on general information as to what it would cost to build such a system and supply it with adequate gas reserves, but was employed to design and estimate the system with the same detail and accuracy as if the system was to be built and Ford, Bacon & Davis, Inc., intended to contract its construction. The Commission, as shown by the above quotation, gave this evidence little, if any, consideration, although its importance from the point of view of the companies is well illustrated by the fact that they paid these engineers $16,444.16 for their services and the time and detailed work which their study made necessary.

Counsel for appellant state that the evidence in regard to this hypothetical line was given little consideration because of the fact that it did not take into consideration the many gas fields in Kansas and Oklahoma. This is a strange contention in view of the fact that the Commission reduced the allowance for lease value by finding that gas reserves in Texas were sufficient for the requirements of the company for many years without drawing on the Kansas or Oklahoma acreage. The engineers employed were instructed to build the line to Texas for the reason that in no other place could it even be assumed that sufficient gas reserves could be acquired. That the gas in Kansas to which the system is connected is essential to service is evidenced by the fact appearing in the record that at intervals the pipe line to Texas has been out of service, due to breaks in the line, but that such interruption was unknown to customers on account of the fact that the supply in Kansas and elsewhere was sufficient to bridge over the emergencies. It must be apparent to

the court that if this hypothetical pipe line had been designed to connect with all existing gas fields to which the present line is connected, the cost would have been infinitely greater. Yet the fact that it is not so connected seems to be the sole basis for the contention of counsel that this evidence is entitled to no weight. It is not contended by counsel in support of this argument that the gas fields in Kansas are sufficient, as the fact that they are not cannot be disputed. If then they are not sufficient, the hypothetical line would, of necessity, have to be connected with the Texas field or some other field which would supply the deficiency.

Rhodes testified in connection with the hypothetical line that it would not render the service of the present system of the Cities Service Gas Company for the reason that it consisted of one line to each of the markets and was connected to but one field, which would not give the guarantee against interruption of service which now exists by reason of the inter-connection of the pipe lines of the present system served from many different fields.

When the above outlined facts are taken into consideration, we insist most earnestly that this evidence was entitled to, and should have been given great weight, instead of having been ignored.

Counsel states that there was no occasion for the construction of two 24-inch lines to the Texas field,

> "—in view of the fact that the company had a large amount of local gas available in Kansas and Oklahoma. This hypothetical pipe line covers a different plant and a different system and was more expensive to construct because the engineer in his estimate went farther than necessary to obtain the gas."

This argument was entirely without the record, no witness having testified that any such thing was true and

it being apparent from the contentions of the Commission itself that no adequate supply of gas for the system could be procured from any field other than that in Texas. It is very true that there is gas in Kansas and Oklahoma which is connected with the present system; but it is absolutely untrue that that supply is adequate or that any other line could be thought of or constructed which would serve the present markets with an adequate supply of gas at a less cost than that estimated by Ford, Bacon & Davis.

Assigned Error Number 5.

Present Values and Prudent Investment.

Under this assignment of error, counsel for appellant take exception to the finding of the court below that

> "The present values are on the extensive constructions of the last few years, less than the prudent investment therein."

The argument in support of this contention is based on two propositions: One, that a comparison of company costs and engineer's estimates on the construction of the Wichita-Ottawa 20-inch line does not bear out the court's finding; and the other, that there was a write-up of over $9,148,627.00 in the case of the Kansas Natural Gas Company.

We may be unduly dignifying the argument in regard to the construction costs of the Wichita-Ottawa 20-inch line by replying to it at all, for it must be apparent to anyone that one line out of the many involved in the system cannot be selected as the basis for any such comparison. We do not know why this particular line was selected.

Perhaps it was for the reason that the contractor, as he testified, on this line lost $128,000.00 over the actual cost of the labor on the line to him. The figures which counsel use as showing the cost of this line to the company are stated to have been made from an analysis of job order No. 12,145. We have, under another chapter of this brief dealing with right of way, shown that job orders do not represent actual cost to the company and contain none of the expense occasioned by the land and lease department, the legal department, the geological department, or any other than the construction department; or overheads which are otherwise capitalized. In addition to these objections, we might add that the job order is not in the record before this Court, and there is nothing in the record to show that any of the purported figures are correct.

The second argument of counsel is, that there is a write-up in the plant and investment account of the Kansas Natural Gas Company of $9,148,627.00. Counsel state that this write-up appears in Exhibit 9 introduced before the court. This is outside of the record, Exhibit 9 not being included in the record herein. And there was no evidence before the Commission or the court below that if any such write-up occurred in the plant account of the old Kansas Natural Gas Company before its acquisition by the present owners and consolidation with the present companies now comprising the system, it was carried into the plant and investment account of the present company.

Counsel state in their brief at page 146

> "That the total plant investment and other assets including leases is $95,948,321.00."

Counsel attempt to disprove the finding of the court by deducting from this admitted figure obtained from the books of the company the item of claimed write-up which they have not proven and which is not in the record before this Court and which applied to a predecessor company, and have then attempted to depreciate the resulting figure for the purpose of showing a less figure than that found by the court.

The finding of the court below is, that the actual prudent investment of the company in these properties was greater than the reproduction cost new depreciated value which the court found. The court did not find that the prudent investment depreciated was greater than present value, but merely that the prudent investment was greater than such value and this statement is borne out by the argument of counsel.

Assigned Error No. 6.

Conclusion As to Valuation.

Under this heading counsel for appellant have called attention to an error of $1,011,392.00 in the Commission's valuation, which correction we have accepted and applied to the valuation elsewhere in this brief.

The statement is made that although the valuation was made by the engineers in the summer of 1931, they did not use depressed prices then prevailing. The only thing cited in support of this statement is the quoted testimony of Black, to the effect that in making his appraisal, it was not his idea to use rock bottom prices of labor or material. There is nothing in the record to show that Hamilton did not use prices existing at that time and he has, as a matter of fact, done so. What prices Black

used we do not know, but evidently they were prices below anything anyone had ever known, for the Commission itself, in many instances, raised him thousands of dollars, and they are shown by the record to have been below the actual quotations received by Hamilton from manufacturers and used by him in his valuation, such prices being as of September 1, 1931.

The conclusion that Black was below normal prices is also evidenced by the fact that his valuation in almost every instance was lower than the actual cost to the company of the item priced, as we have hereinbefore set out with respect to the cost of drilling wells and constructing compressor stations. The court below recognized this situation when it stated in its opinion: "The Commission's figures are so far below the cost of these wells or any other well in the vicinity, that they approach the arbitrary." (R. 305.) The Commission in each instance adopted Black's figure or increased it, so that the above comment of the court is equally applicable to Black's valuation.

Our conclusion of value is that there should be added to the value which the court found, $82,380,583.00, the sum of $1,102,500.00 by reason of the failure of the court to apply agreed overheads to the cost of the leases found by it, if cost is the proper method of valuation, or the sum of $2,310,000.00 if such overheads should be applied to the present value of leases, which the court found to be $12,000,000.00. This would leave the valuation found by the court adjusted to correct this error either $83,483,083.00 or $90,963,311.00.

Rate Base During Each Annual Test Period.

Counsel for appellant said that the test period used in the investigation covered the years 1930 to June 30, 1932, leaving the impression that this was a test period agreed to by appellees. This is not true and the appellees never took any position other than that the reasonableness of the contract under consideration was to be determined as of the date of the hearing, and on the then experience of the company. It was agreed by the parties that the valuation should be made by the engineers as of September 1, 1931, and the Commission in the beginning requested the appellees to furnish an exhibit showing their financial experience for the last available period, which was June 30, 1931. The hearing having dragged out through the year 1931, on the request of the Commission the appellees furnished a further exhibit showing their experience for the year ending December 31, 1931, and, on rehearing, brought their experience up to date by an exhibit covering the period ending June 30, 1932. The reason the last two exhibits were furnished by appellees was for the purpose of showing their experience at the time of the hearing, it never being conceded by the appellees that it was proper for the Commission to take into consideration anything other than existing conditions.

For the purposes of this suit the appellees have consented to the application of its earnings for the year ending June 30, 1932, to the value found as of the agreed date of September 1, 1931, although it is apparent that such practice was to the disadvantage of appellees for if an accurate figure is to be arrived at as to rate of return, there would have to be included in the valuation of September 1, 1931, the additions and betterments since that date. This was not done because of the delay and expense involved and because, from appellees' viewpoint,

the earnings for the year ending June 30, 1932, showed the contract in question to be reasonable when applied to the valuation of the property in existence the previous year.

At no time during the hearings held by the Commission was any suggestion or intimation given by it or its attorneys, that it proposed to average earnings and average values over a period of years, and we are confident that such an idea did not occur to the Commission until, on its own findings, it came to the conclusion that the earnings for the last available period, when applied to the lowest value the Commission could find of the property, were still reasonable. It then resorted to the expedient of averaging earnings and averaging values, and arrived at the erroneous conclusions set out in its original opinion.

The figures which the Commission has used in undertaking to establish average values and average earnings are obtained from an exhibit which was introduced by its accountant, the purpose of which at the time was to support the Commission's contention that it was improper to apply the earnings of December 31, 1931, to the value of September 1, 1931, for the reason that such earnings came from only a portion of the property represented by the plant account, due to the fact that some of the property had been built within that year and while it appeared in the valuation, had not been in existence for the full year covered by the earnings statement. Appellees introduced evidence to show that this exhibit was entirely erroneous for the reason that it had been made up from the books whereas job orders frequently were held open for a year or two after the property was actually placed in operation before being charged into the books. This testimony appears in the record at pages 517 to 528 inclusive. It

is our contention that the exhibit from which these computations are made is entirely erroneous and not dependable. Had appellees known or had any reason to suspect that the Commission intended to use that exhibit for the purpose of averaging earnings and averaging values, the facts would have been shown but, even on the record as it exists, this method of arriving at average earnings is discredited.

We desire again to emphasize that the appellees at no time consented to any such thing or were given any opportunity to show the errors in the Commission's figures. The contention of the appellees before the Commission was and now is that if the Commission had any jurisdiction whatever, it was limited to ascertaining the present reasonableness of the contract on present values and the present experience of the company.

In support of their contention that it is proper to average earnings and average values, counsel quote from the opinion of the court below, in which it is stated "We agree with the Commission that 1932 should not be taken as a test year, for it marks, it is hoped, the low of the depression through which we are passing." That statement was made by the court almost a year ago and we regret to comment that the hope expressed by the court has not been realized and that, in fact, the low of the depression, if it has yet been reached, came long after the court's opinion was rendered. This merely demonstrates the danger of attempting to base a rate on hope instead of experience.

The depression has not passed, or even indicated that its demise is "just around the corner" as it was supposed to be some years ago. The business charts of today show little if any increase in the gas business, but do show greatly increased expense in holding the old busi-

ness, due to the NRA and the avowed policy of the present administration to increase labor and commodity prices, other than the commodity which public utilities happen to have for sale.

It is impossible for appellees to answer properly the labored and involved argument set forth under this heading for the reason that there is no record upon which the argument can be based and no record upon which the contentions can be answered.

The whole argument is based on the assertion that the test period used in the present investigation covered the years 1930 to June 30, 1932. As we have attempted to set out under the previous heading, there was no such test period ever agreed upon, and appellees had no reason even to suspect that any such contentions as are now made would be made.

The further statement is made that earning statements were submitted for yearly periods as follows:

> Year ending December 31, 1930;
> Year ending December 31, 1931;
> Year ending June 30, 1931;
> Year ending June 30, 1932.

It may be true that an exhibit was before the Commission setting forth the results of an investigation of job orders made by the accountant for the Commission as to these periods; but the inference that these statements were submitted by appellees or that appellees consented to their being considered in determining average investments is absolutely untrue. We have reason now to believe that this exhibit was not introduced by the Commission for the announced purpose, but for the express purpose of enabling it to avoid the obvious result of ap-

plying the then present earnings to the then present value. Appellees had no intimation that any such thing was to be done, and no opportunity to meet any such issue. Since the latter exhibit did not show any improvement in earnings or any improvement in the rate of return, the appellees took it for granted that the Commission would not attempt to change the date certain on which their finding was to be based.

The statement next made in appellant's brief is:

> "From findings of the Commission, it appears that the anticipated test period when the investigation was started was the year ending December 31, 1930, and the year ending June 30, 1931."

This statement of counsel was evidently made inadvertently, for it is an admission of all that we have heretofore said with respect to our never having agreed to averaging earnings or values over a period of years, but that it was intended at the time by all parties that the earnings of the company for the last available annual period should be taken as the measure of the reasonableness of such earnings.

The next argument of counsel for appellant is, that the books of the company showed an increase in plant and investment of $46,000,000.00 since November 30, 1926. If appellant desires to base the determination of this controversy upon the plant investment as shown by the books of the company, we are perfectly willing to submit the case on that basis; but, having repeatedly stated that they were not, we submit that no such argument should now be made.

Counsel proceed with the argument:

> "It is obvious that a comparison of net income during 1930 with the value of property used and useful as of September 1, 1931, would furnish no indication of the net return earned during 1930 on the value of the property used and useful during that year, as large additions were made to the property currently during all of that period as well as during the period from December 31, 1930, to September 1, 1931."

We do not see how this argument concerns the present consideration except as it admits the statement which we have repeatedly hereinbefore made that we have given the Commission an advantage to which it is not entitled in applying the earnings of the company as of June 30, 1932, to the value of September 1, 1931, for the reason that all additions since September 1, 1931, are eliminated. If there should be included additions since September 1, 1931, the application of present earnings to present values would be much more advantageous to the contention of appellees than the contentions we have hereinbefore made.

The remaining argument of counsel for appellant is based entirely upon the correctness of the exhibit from which the Commission attempted to determine the value of property in use at a certain period and the earnings of that period. As we have heretofore set out, the exhibit upon which the Commission based its findings was predicated upon the plant account as shown by the books whereas under the practice of the company job orders were not closed into plant and investment account until all of the claims and law suits arising out of that construction work had been settled, which usually required one to three years. The court below saw clearly that

this was true, and in the quotations from the opinion which appear in appellant's brief states:

> "—but this (the conclusion from job orders as to what property was in service at a particular time) is shown to be inaccurate because additions were not charged to capital until long after the addition was in service; a lag of some one to three years was customary in order to close up all claims growing out of a particular job."

We submit that in determining the present reasonableness of a contract, the entire procedure of the Commission was unwarranted, even if based upon dependable facts, and that these basic facts having been shown to be erroneous as found by the court below, no consideration should be given to any such yard stick for the measure of present reasonableness.

Net Income Before Depreciation and Depletion.

There is nothing in the argument under this heading other than a repetition of the argument previously made that it was proper to average earnings. We believe we have fully answered this contention elsewhere in this brief.

We might, however, call attention to the fact that counsel for appellant state that the only evidence justifying any addition for amortization of rate expense was the fact that the Commission taxed $66,935.08 as costs for the distributing company respondents. We recall very distinctly that elsewhere in this brief the company has made no reference whatever to the Kansas statute and, as stated, that the Commission's jurisdiction was assumed under the authority of the Western Dis-

tributing Company case which was decided more than seven months after this proceeding was started. There is nothing in the Western Distributing Company case which authorizes the Commission to tax the cost of a proceeding to the parties thereto, and this reference to the fact that the Commission did so tax such costs shows very clearly that the Commission was, in fact, proceeding under the authority of the statute which gives it no such authority as it has assumed.

The cost of this proceeding to the Commission may have been the figure quoted, but the expense of producing the evidence which the Commission required was far in excess of that figure. In the opening statement to the Commission (R. 226) counsel for appellees stated that the expense incurred before the taking of evidence started amounted to between $150,000.00 and $200,000.00. Before the proceeding ended, the expense exceeded $250,000.00. Who is to pay this expense? If the distributing companies should charge it to their operating expenses, what is the chance of having such an item allowed in view of the attitude the Commission has taken throughout this proceeding and in view of the fact that proof was offered that they are not now earning a fair return? The distributing companies being faced with the calamity of having to pay 40 cents for gas at the city gate, and basing their rates on 30 cents, which, under the undisputed evidence would result in insolvency, put on all this evidence to justify the reasonableness of their contract knowing that they could not get an item of $250,000 allowed as an operating expense and a basis of increased rates, they requested the pipe line company to assume this obligation, which it did; and the expense is amortized over a period of years at the rate of $50,000.00 per year. The Commission found that by reason of affilia-

tions, all the companies concerned should be treated as one. If so, and it being apparent that someone has to pay this expense, it should, on the Commission's reasoning, be immaterial to it which pocket the money came out of, and this item should not have been eliminated.

We again submit that in determining the reasonableness of the contract under consideration, the earnings of the Cities Service Gas Company as agreed upon for the year ending June 30, 1932, should be adopted at the figures shown by the company's books and without deductions therefrom.

Annual Depreciation and Depletion Requirements.

Annual Depreciation.

As stated by counsel for appellant, the parties agreed on 2.96 per cent to be applied to the value of physical property of the Cities Service Gas Company other than leases as a proper allowance for annual depreciation.

We have no comments to make other than that this percentage should be applied to the value of the physical property found by this court.

Annual Depreciation for Years Covered by Earning Statement.

We have heretofore set out our contention that it is not proper to average values or average earnings, both for the reason that the method is wrong in determining the present reasonableness of a present contract, and for the reason that the basic figures used by the Commission in this computation are erroneous and that appellees were given no opportunity to demonstrate their error.

The question of proper reserve requirements is not a question of mathematics or of averages, but is a question of what is presently necessary under present conditions, and is a matter which is to be determined by the business judgment of those in charge of the property, as was held in the case of *Southwestern Bell Telephone Company* v. *City of Fort Smith,* 294 Fed. 102, wherein the court said:

> "While the city may prescribe rates for telephone service, it is not the owner of the telephone plant. The telephone company is the owner of the plant and operates it. Its officers and employees are charged with the responsibility of its operation. Their experience enables them to form a judgment with reference to the amount to be reserved for depreciation. Until the Interstate Commerce Commission through its investigation shows the amount reserved by the company to be excessive, prudence would dictate that the judgment of the company upon that point should be permitted to stand."

The only evidence introduced before the Commission or before the court below as to depreciation requirements was the testimony of Eastman in support of his exhibit No. 27 in which he set up reserves totaling $3,276,325.07, which the Commission cut to the unreasonable figure of $1,702,764.00 (R. 156). Eastman testified that in preparing the exhibit he consulted with officers of the company and that the figures which he set up in his exhibit represent the judgment of such officers, and in many instances are the actual figures taken from the books of the company. There was no attempt to contradict this evidence by any showing of bad faith, fraud, or imposition, or that the books of the company did not show such allowances actually set up thereon. In the absence of

such a showing, the judgment of the officers of the company should prevail, and certainly the presumption that these allowances are proper should not be overcome by any presumption of the correctness of results attained by the Commission in juggling figures in the manner attempted herein.

Assigned Errors Nos. 15 and 16.

Annual Depletion Requirements—Gas Leases. General Development Expense Capitalized.

The substance of the argument under this heading is that if the Commission was right in eliminating all leases which it did eliminate for the reason that they were not used and useful, then the company is not entitled to an allowance for carrying the leases not found to be used and useful. With this argument we have no quarrel, but we contend, as hereinbefore set forth, that the Commission had no right to substitute its judgment, unsupported by any operating experience on the part of any member of the Commission and unsupported by any evidence in the record before the Commission, for that of the officers of the company responsible for service as to used and useful leases. If we are correct in our contention, then the allowance by the court of $329,917.00 should be sustained; otherwise, it should not.

Counsel for the Commission argue that in the Commission's valuation there was allowed not only the cost of leases but in addition all expenses for geological investigation, scouting and other expenses in procuring said leases, and in addition to this there was included an enhanced value as of September 1, 1931, in the valuation which they have fixed as the fair market value of these

leases as of that date (App. brief 161). This statement is entirely erroneous, and is not supported by the record. If the Commission, as stated by counsel, placed in its valuation the leases which it did allow on the basis of fair market value, they certainly did not include any of these expenses. It may be that the company in its geological researches expended thousands of dollars in investigating a field, which investigation resulted in the purchase of a lease for $100.00 or in no purchases whatever. If it did purchase a lease, it is immaterial what it paid for it or what the preliminary expenses were. The Commission judged the value of the lease on the basis of what it could be sold for at the time of the hearing. Counsel's statement that the Commission allowed fair market value is entirely inconsistent with the statement that these other expenses were included, and is untrue. There is no duplication and could be none if the leases were valued, as the counsel state they were, on the basis of fair market value.

Amortization of Non-Producing Leases.

The argument of the appellants under this heading is based on the supposition that the inclusion of non-producing leases at their fair market value in the rate base and an allowance of a fair return on that item plus an inclusion in the operating expenses of the cost of amortizing these non-producing leases results in a duplication reflected in rates to the customer.

This assumption is erroneous as is clearly shown by a careful consideration of the situation. The ordinary gas lease runs for a period of ten years and covers an annual rental during each of these years prior to the

time when the leases are developed. After the lease has been developed, this annual rental is replaced by a percentage of the gas produced from said lease. The error in the assumptions of the counsel for the appellant is that they assume that a lease which originally ran for ten years and has only one year to run would have the same fair market value as a lease on the same property which has ten years to run. This is directly contrary to the facts.

When any man experienced in the purchase and sale of leases attempts to compute the fair market value of a particular lease, his opinion is at once influenced by the length of time in which he has to develop that lease, and he does give a much lower value to a lease with one year to run than he would to a lease with ten years to run.

The inclusion in the operating expenses for amortization of undeveloped leases is just an inclusion of the amount of depreciation that occurs in these leases which depreciation was taken into consideration by the witnesses in their determination of the now present fair market value, and its inclusion is in no way a duplication of the item which is included in fair return based on fair market value.

There is no more duplication in this situation than there is in the determination of the present fair value of a piece of pipe or a compressor and the inclusion at the same time of the depreciation allowance which is to cover the reduction between the reproduction cost new and the present value in that same item of property. We do not understand the purpose of counsel's argument, inasmuch as the court below agreed with their contention, although the court stated, "Accordingly, with hesitation, we disallow the item." It seems very clear to

us that both the court and the Commission were in error in their findings.

Dry Hole Expense.

The argument of counsel under this heading is answered as well as we could do so by the finding of the court below, which is as follows:

> "The Commission assumed that one dry hole a year would be all that would be suffered in an orderly development of this vast property. The actual expenditure in the test year was $174,747.74, a sum representing the cost of ten or eleven dry holes. The facts must govern. The company is not needlessly drilling dry holes, and geology has not reached the point where only one dry hole a year can reasonably be anticipated by a company owning nearly a million acres of prospective leases, scattered in three states and many fields."

The contention made by counsel is such as could be expected from those entirely unfamiliar with the operations of a gas company such as the Cities Service Gas Company and the action of the Commission can perhaps also be accounted for on that ground; however, these non-experts have no right to assume without evidence, and the court will note that no citation is made to the record in support of any of the contentions made, that the company is going to any unnecessary expense in drilling dry holes; the entire argument is based on the assumption that these dry holes are to be drilled as "wildcat wells" on unproven territory. The fact is entirely overlooked that many leases provide that they must be drilled within a definite time in order to hold the lease and when this is done, it

must be anticipated that some dry holes will result. The Commission has assumed that the Cities Service Gas Company has a supply of gas much in excess of its requirements and that it has had for a number of years. If this is true, it is ridiculous to assume that the company in 1930 spent $174,747.74 in a search for gas which it did not need.

The argument reverts to what we have hereinbefore stated, that the officers of the company are presumed to be operating in the most economical manner and are making no expenditures other than such as of necessity have to be made. Many dry holes are drilled in proven gas areas and the argument of counsel falls because it takes more than one point to outline a circle and a proven gas area is always outlined by dry holes drilled at the edge of that proven gas territory, as well as by the fact that there is nothing in the record to support the argument made.

Assigned Error No. 18.

Fair Rate of Rate Return.

We have, in a previous part of this brief, set out in full the evidence introduced before the Commission and the court below as to a proper rate of return, and in addition have quoted the Kansas statutes which prohibit cities of the second class from fixing rates for gas companies which will produce less than a return of at least 8 per cent and in cities of the first class prohibits a return of less than 10 per cent.

We believe our previous argument fully answers everything that is said by counsel under this heading so far as a proper rate of return is concerned.

Counsel attempt to avoid the undisputed evidence in the case and the Kansas statutes by arguing that the financial history of the company since 1926 indicates that its total assets have been increased to such an extent that its earnings must have been unreasonable. This argument is made without support of the record for nowhere does it appear that the increase in assets resulted from earnings either reasonable or unreasonable; nor does the record show any valuation for those previous years on which an assumption could be made that there were unreasonable earnings, but even if there was support for these contentions, they are beside the point for it has repeatedly been determined by this and every other court which has ever considered the question that past losses can not be recouped in present rates nor excessive past earnings be taken into account in determining a proper rate for the present.

Effect of Commission's Order on Income.

Under a previous heading, we have applied the stipulated decrease in earnings to the business of the company for the year ending June 30, 1932, and as no errors have been pointed out in our calculation, we submit that they are correct. Counsel appreciate this when they attempt to argue that if the 30c rate had been put in effect, the additional consumption of gas would be such as to increase the earnings stipulated for the year ending June 30, 1932, and that therefore, such earnings are not a proper basis for the determination of the future experience of the company.

If, under any circumstances, there could be any basis for such an argument which is based on pure guess

work and conjecture, there certainly can not be in a case where the Commission itself comes into court and confesses to the invalidity of the order passing this reduction on to the consumer.

As this case now stands, there is no order reducing rates to consumers and can be none until valuations are made of the properties of all of these companies and their financial experience determined, which is a situation that can not arise for years in the future. We fail to see how the counsel for the appellants can predicate an increase in the consumption of gas on the part of individual customers due to a reduction in the cost of gas to the distributing company which reduced cost of gas, by their own confession, is not passed on to the ultimate consumer.

Rate of Return Under Commission's 30c Order.

We have previously fully discussed the application of the Commission's order as applied to the experience of the company for the last available period, June 30, 1932, and have also answered the contention that the year 1932 was an abnormal year, not properly taken as a basis for probable future experience. Its abnormality, as we have pointed out, is that it did not include the increased expenses and the decreased earnings caused by the NRA codes and the policy of the present administration to increase labor prices and the prices of all commodities other than gas. We also desire to contradict the statement made that the court below in its finding, abandoned the original test period. The court adopted the only test period to which appellees ever agreed and gave the appellants the benefit of an unrealized hope that 1932 was the bottom of the depression.

Decreased Income, Due to Loss of Industrial Sales—Value of Domestic Service.

The entire argument under the heading is that the earnings of the company, as shown by the experiences for the year ending June 30th, 1932, were lower than can be expected in the immediate future by reason of the fact that the company has sustained a *temporary* loss in income due to the decrease in industrial sales. The further statement is made "that loss was caused by abnormal conditions, if abnormal they will improve in the future." This is another attempt to determine reasonableness on the base of hope instead of experience. We sincerely wish it could be established that "if abnormal they will improve in the future." At numerous times during recent years nationally known economists, financiers, and persons occupying positions of importance in the government, have stated that the bottom was reached and conditions were bound to improve. They did not. On the contrary they became worse. With counsel we hope that the bottom has been reached, but we know far less about the situation than those who predicted it had been reached some years ago.

We are now supposed to be arguing as to the reasonableness of the conclusion reached by the Commission in 1932. There certainly has been nothing in the subsequent experience to indicate that the position taken by the Commission, or by the court, was justified, and we certainly are not optimistic enough as to the future to base our conclusion, as to the present, on what the future may have in store for us.

It appears to us also that this argument of counsel for appellant is entirely out of order for the reason that the business of the Cities Service Gas Company is that of supplying the requirements of its domestic consumers.

The supply to industries is purely incidental and is entered into because service to domestic consumers could not otherwise be maintained. It requires at least one day to transport gas from Texas to the major markets of the system. It is a matter of common knowledge that drops in temperature, of as much as thirty or forty degrees, frequently occur. In order to meet these fluctuations it is essential to service that the pipe line company either have storage tanks near points of delivery, the cost of which would be prohibitive, from which to meet the demands on the system, or have some other means of having immediately available a sufficient amount of gas to meet the fluctuations in the demands of the domestic consumers. In order to meet this contingency all of the contracts for industrial gas contain a clause providing that service may be discontinued when the supply is necessary for domestic consumers, and the industrial consumers are required, by such contracts, to maintain other fuel which can immediately be substituted for gas. The industrial consumption in the major markets is such that within one hour millions of feet of gas can be immediately made available for domestic use, and experience in the past has shown that in the absence of such gas, service would have failed completely. Therefore, industrial business is not primarily sought, or kept, for the purpose of profit but as a guarantee to domestic service. The price at which industrial gas is sold is determined absolutely by the price of other fuels. Before industries can be interested in the use of gas as a fuel it must be shown that they can make a saving over coal or oil, consequently without regard to profit, and even if the company was merely trading dollars, it would still be essential that the industrial business be maintained. It therefore follows that the argument of counsel should be given no con-

sideration and the cases cited to the effect that one class of consumers should not be required to carry the burden of another class are not applicable.

Assigned Error No. 20.

Under this heading counsel for appellant make some statements which to us are most surprising. As we read the argument, counsel are attempting to make the point that in the beginning the appellees herein consented to the jurisdiction of the Commission to determine the reasonableness of the gate rate charged them by the pipe line company, but objected to the Commission making any finding as to the valuation or earnings of their separate properties.

It is impossible to answer this contention and confine ourselves to the record before the Court, for in preparing that record, we certainly did not have in mind that any such contention would be made or that an issue was presented as to what we thought about the proceeding in the beginning, or at any other time.

In order that the Court may understand what this situation was, we are intentionally going outside the record before this Court and referring to the record before the Commission and the court below, so that if this Court considers any of the things argued by counsel under this heading material, the Court may order up the further record to which we have herein made reference.

The first thing that occurred was the opening statement of counsel for the several distributing companies, in part as follows:

> "If the Commission please, at the outset we must confess some uncertainty and confusion as to the nature of this proceeding; the purpose of the Com-

mission; its jurisdiction and our duty. There has never before been anything of the kind attempted and there is no precedent to follow. For this reason and to avoid any uncertainty as to our contentions we have filed written appearances for the several respondents.

We say the proceeding is unusual in that we have here joined in one order and involved in one hearing separate and distinct properties in some one hundred and eighty cities and communities. Some of these properties have heretofore been involved in separate rate hearings and such hearings as to one property have taken weeks. The rates of each system must of necessity be based on the value of its property and its financial experience. The statutes contemplate separate hearings and provide for a review by the courts on the record as to that property, the venue being determined by the location of the property. It would lead to the utmost confusion, would thwart the purposes of the statute and would jeopardize the statutory and constitutional rights of these several respondents should they be expected to submit to a joint hearing involving the valuation and financial experience of one hundred and eighty properties, none of which is, in any manner, concerned with any other property. We therefore enter this proceeding with the definite contention that it is not a rate case as to any particular property and involves no consideration of the reasonableness or unreasonableness of their rates.

In coming before this Commission we do so doubtful of the legal rights of the Commission to compel us to incur this expense, doubtful of the legal right to fix an interstate rate in view of many decisions of the United States Supreme Court to the contrary, but realizing a duty to the public to answer our accusers and make all facts public.

We trust this Commission will hear our evidence with open minds and give to us in some measure the benefit of an honesty of purpose. We have naturally

been disturbed by articles that have appeared in the press, attributed to members of this body, from which, if true, it would appear the case has been prejudged and its issues determined against us in advance. If so, of course this proceeding is but a farce and an idle gesture. We hope, however, by our conduct in presenting it, to merit your fair and honest consideration."

This statement appears at page 226 of the record, and we have quoted two paragraphs from that page, and two from page 228, but request the Court to read the entire statement.

Before the taking of testimony was commenced, a further discussion was had before the Commission as to the nature of the proceedings, and the Commission's attention was called to the formal objections filed by the distributing companies which are set out in the record herein at page 27. In that discussion, the Commission's attention was called to the last paragraph of the order under which the proceedings were held, in which the following apears:

"* * * and adjustment made in this respect as to charges made to the consumers."

The Commisison was asked whether this meant that this proceeding was a rate case. The question was answered by Mr. Hatcher, attorney for the Commission, as follows:

"The only thing that we have in mind here is to investigate the reasonableness of those contracts. If it is then disclosed that they are unreasonable, it will then be necessary for the separate utility to come in and show cause why that rate should not be reduced and a reasonable part of the reduction passed on to the consumer. I think that is clear." (Transcript 28.)

In the course of further discussion, the following occurred:

> "Mr. Hatcher: You are not denying the jurisdiction of the Commission to enter into an investigation to determine the reasonableness of the holding company contracts? Let us get straight on it. You are not denying their jurisdiction?
>
> Mr. Garver: I am not denying their jurisdiction to investigate, no.
>
> Mr. Hatcher: And determine the reasonableness?
>
> Mr. Garver: To enforce its determination, there is a serious legal question there." (T. 29, 30.)
>
> * * * * * * * * *
>
> "Mr. Hatcher: Now as to the fixing of an interstate rate, I would like to make this statement, that it is not our intention that the Commission will fix an interstate rate for the interstate pipe line, but we will examine into the reasonableness of that rate, for the purpose of determining the reasonableness of the contract; that is, that the reasonableness of that contract will be measured to some extent, that will be one of the tests, what is the return of the holding company, or the pipe line company. In no case will we attempt to fix a rate for the interestate pipe line, but it is one of the tests that we will use in this case." (T. 30, 31.)

At this stage of the proceedings, in spite of the persistent efforts of counsel to find out just what the Commission was proposing to do, they had succeeded in eliciting nothing more definite than the statement that the Commission was making an investigation of contracts, without any commitment as to what the Commission proposed to do at the end of the proceeding. After considerable testimony had been introduced, a motion was made by the respondents to dismiss the proceeding and end the expense on the testimony of the State's own

experts that the city gate rate was reasonable. This motion was denied by the Commission, its decision being announced by Commissioner Hill, in which he said in part:

> "It may be true, too, that the distributing companies are in the position to oppose any rate reduction that might result, if one could result, as a result of this hearing, but that is a matter that the Commission would have to determine after knowing more about the valuations of the distributing companies."

After the further introduction of testimony as to leases, and the value testified to by the witnesses for the Commission was added to the value of the physical property as testified to by Black, a motion to dismiss the proceeding on the ground that on admitted figures the pipe line company was not making earnings equivalent to 8 per cent for return and 4 per cent for depreciation requirements was made, which was overruled by the Commission as follows:

> "Commisioner Hill: Personally, I think, speaking for myself as one commissioner, it would be an unconscionable decision if at this time and under the present conditions, this commission would permit a return of 8 and 4. For that reason this motion is overruled.
>
> Mr. Garver: That is a very strange statement for somebody to make who is passing impartially on a lawsuit, to say you have your mind made up, to say that would be unconscionable. I am frank to say I cannot understand such a statement." (T. 2000, 2001.)

As the proceeding neared its close, the appellees became suspicious as to the real intention of the Commission and

began to doubt the frankness of its statement that the proceeding did not involve rates to local consumers or that the Commission had changed its ideas as previously announced. Therefore, the distributing companies produced witnesses, had them sworn, and proceeded to show the value of the properties of the distributing companies respectively, and their respective earnings as well as the value of their properties in the aggregate and their aggregate earnings. To this offer of testimony, attorneys for the Commission objected, which objection was by the Commission sustained. In regard to this offer of testimony and the ruling of the Commission thereon, the record below is as follows:

> "Mr. Welch: I would like to add, the only way we can go into that is like we have done with the other properties. It would take a valuation of these distributing plants which the company claims is worth $15,000,000, it would also require an investigation of their earnings, to see whether or not we agree with the claim that they are only making 4.6 per cent on that amount of money, and in order to make worth anything to the Commission at all, it would be necessary for us to make a valuation of this property, go into the question of their earnings, and that we are not prepared to do. It is not germane to this investigation, and I am giving that as an additional reason why the objection should be sustained.
>
> Mr. Garver: There is just one feature of the order which started this investigation, which caused me to put in that testimony, and that is the provision of the order which recites that all of these distributing companies are cited to appear here, and show cause why these contracts should not be revised if found to be unreasonable, and the last line of the order is, '. . . and such reduction passed on to the consumer.' Now it is our position, as I stated in the beginning, that the only way to determine proper rates of each

of these companies is to have a separate rate case as to each one, each company must stand on its own bottom, but where the reasonableness of the inter-company relations is brought into effect and where the Commission wants to know and cites us to show it should not be passed on to the consumer, then I think that we are called on to show the earnings of the distributing companies at the present time are only 4½ per cent and even if there was a reduction made of the City gate rate, it could not be passed on to the public.

Mr. Hatcher: We are not taking the position here, are we, or are you, Judge, that the over-all picture shows a decrease in rates? There may need to be reductions in some places, they would have to be treated separately, and the way this evidence has gone in, it has gone in collectively.

Mr. Garver: Each one must be treated separately, and there must be a separate case as to each one. I have no means of knowing what the Commission has in its mind other than reading its order. It was that provision of the order which caused us to object in the beginning to any rate case as to the separate companies involved in one proceeding.

Mr. Hatcher: We are taking the position this is only an investigation into the reasonableness of these contracts.

Mr. Stone: Isn't it fair to ask what sort of an order would be suggested, as counsel on the other side knows, in case it was found 40 cents should not be allowed, what would be the nature of the order that would be entered? Would it affect each distributing company, or would there then be a hearing as to the value of these properties?

Mr. Hatcher: I would not care to answer that, further than to say I do not think it would reflect the over-all picture, such as this testimony does.

Mr. Garver: If the Commission, in this case, does not intend to make any order as to the rates to consumers in individual distribution companies, this

should be stricken out. If the Commission takes the position that it is going to contemplate any such action, then it should remain in.

Commissioner Hill: If the Commission should find that a reasonable rate were 45 cents, we could not, I take it, in this investigation—

Mr. Garver: Then the only way to do would be for us, if we wanted to change the rates, to go through the statutory procedure for changing them.

Commissioner Hill: If it were found it was a reasonable rate, at the gate, that would be a finding that would be proper, and then there might be an order to the distributing company to show cause why they should not be put into effect, as I view it.

Mr. Stone: Would they be foreclosed on that question—your distributing company would then be foreclosed on the question of whether there was—whether 30 or 40 or 45 cents was a reasonable rate. You might start from there with the investigation. In other words, Mr. Hill, to be perfectly frank, suppose a blanket order is made, saying 40 cents is not reasonable and 30 cents would be reasonable, and then there would be a hearing as to a particular company as to whether its rates should be reduced, would that company be foreclosed or would it amount to an adjudication against that company on that point.

Mr. Hatcher: Was that your point?

Mr. Stone: Until an order is made, how could we appeal, because this blanket order applies to no distributing company, until application is made under it.

Mr. Hatcher: It would apply to it if they were paying too much for gas, the contract is unreasonable, and if a reduction should be decided on, they are paying 5 cents or 10, or 15 cents too much.

Mr. Stone: But it cannot go into court and contest that order, until it is shown it affects its rates and confiscates its property.

Mr. Hatcher: I think any one of them or all of them could, because we have said the contract is unreasonable.

Mr. Garver: I want the record to show I am offering this testimony, by reason of the fact of the order which cites us to show cause why if a rate reduction is made, it should not be passed on to the consumer.

Mr. Hatcher: It is my idea that the companies would then have an opportunity to show whether or not, in a separate hearing, the reduction should be passed on.

Mr. Stone: Yes, but would they be foreclosed on the question of whether 40 cents was a reasonable rate or not?

Mr. Hatcher: Absolutely.

Mr. Stone: Then if they would, it ought to go clear down the line as to the distributing companies, in order that they may—when that order is made, an appeal may be made to the courts.

Mr. Hatcher: The distributing company is the only one in justifying this contract.

Mr. Stone: Our property is not confiscated until a reduction order is made.

Commissioner Hill: There are three points involved in the investigation. The 1¾ per cent fee, the 5 per cent fee and the reasonableness of the rate at the city gates, charged by the main lines. If we opened the hearing, or proceeded upon the theory now that we would investigate the reasonableness of the rate as it applied to each distributing company, as suggested by counsel for the state, there would have to be an appraisal and valuation of each distributing company's property, I think, under the scope of the investigation, the objection should be sustained and that the testimony should be stricken out.

Mr. Garver: We are offering to show, under the terms of the order that cites us to show cause why the reduction, if made, should not be passed on to

the distributing companies, that they, as a whole, are earning only 4.6 per cent, and that each company as this time is making less than it is entitled to earn on the present fair value of its property, and that considering the property as a whole, and assuming that it is all owned by the Cities Service Company, both the pipe line and distributing companies, that the entire properties are not earning a fair return at this time.

* * * * * * * * * *

Mr. Garver: If the Commission is contemplating passing this reduction, or passing any reduction on to the distributing companies, we now formally demand a separate hearing for each distributing company, a separate docketing of each case, separate and distinct from all others, and a hearing as to the valuation and financial experience of the several companies.

Mr. Hatcher: That is a question to take up after the Commission makes an order.

Mr. Garver: Counsel has just said we would be estopped after your order is made, to dispute it.

Mr. Hatcher: You do not have to open up this same hearing again in each one of the plants.

Mr. Stone: We want it in the record in each case, we will show in each case, it may not be as a part of the record.

Commissioner Hill: You would probably offer it if there were other hearings.

Mr. Stone: Yes, but he says we are estopped by the order, and therefore we cannot question it and there is no appeal to take from a blanket order.

Mr. Hatcher: It is my idea, the order will be only as to the reasonableness of these contracts, and the Commission has a right to investigate any single property of any utility.

Commissioner Hill: The objection will be sustained." (T. 2857-2864.)

From these excerpts from the record, this court must now clearly understand that the appellees during all the time they were before the Commission had no distinct idea as to what the Commission intended to do or what they were called upon to do to protect their rights. In the face of repeated statements of counsel and Commissioners to the contrary, this proceeding ended in the order of July 20, 1932, in which the Commission found that any rate for gas at the city gate in excess of 29.5 cents was unreasonable, and mandatorily ordered the distributing companies to immediately reduce their rates to local consumers so as to pass on the difference between purchased gas at 40 cents and 29.5 cents. The court will note that but one order was issued at that time.

After the application for rehearing was filed, which appears in the record at page 29, and after the argument of counsel for appellees on the rehearing granted, evidently the Commission itself became extremely skeptical as to the validity of the order it had previously issued, and in despair grasped at the expedient of issuing two orders, which it did on August 31, 1932, being the orders in controversy herein.

We have set out the foregoing record in some detail in order that this court may clearly see the unfairness of appellant in attempting to argue that appellees changed their position before the Commission with respect to its jurisdiction. As a matter of fact, the appellees never knew where they were and never had any position. They tried their best to pin the Commission down to some statement as to what it proposed to do, and as a result of their efforts were repeatedly told that the case was not a rate case. Notwithstanding all this, the Commission deliberately did just the thing it

said it did not propose to do. It made an order affecting local rates, after saying it would not do so, and after repeatedly refusing to hear the evidence offered by appellees as to the value of their respective properties and their operating experience. It seems to us that appellant is in a poor position to now argue that appellees are guilty of any vacillation.

Conclusion.

We respectively submit:

1. That the Public Service Commission of the state of Kansas was without jurisdiction or authority to issue the order for investigation set out in Exhibit "A" to the bill of complaint in the court below (R. 25), or to conduct the hearings which it did conduct thereunder.

2. That the two orders issued by the Commission under date of August 31, 1932 (R. 59-62), should be considered as one order establishing rates to local consumers, and that upon confession by appellant that the part of such order which established local rates was void the entire order should have been permanently enjoined.

3. That there is no justiciable issue now before this Court, and the decision of the court below should be affirmed for the reason that all issues are now moot.

4. That the reasonableness of the day to day contract between the Cities Service Gas Company and the several appellees herein respectively under which gas is purchased at the city gate should be determined on present values and present operating experience, and not by the consideration of undependable average values, average

earnings and average replacement reserves as was done by the Commission.

5. That on the admitted facts the earnings of the Cities Service Gas Company under its said contract are reasonable and should have been so found by the Commission.

6. That no examination by this Court as to the value of the property of the Cities Service Gas Company or its earnings is necessary or proper herein for the reason that on the admitted facts the contract of the Cities Service Gas Company is a reasonable contract unaffected by the affiliation of the parties, and such a contract as parties dealing at arms' length would have entered into.

7. That the findings of the court below, if value is in issue herein, are supported by the overwhelming weight of evidence.

8. That the decision of the court below should be affirmed.

Respectfully submitted,

ROBERT D. GARVER,
Kansas City, Missouri.

ROBERT STONE,
Topeka, Kansas.

SUPPLEMENTAL BRIEF

In the Supreme Court of the United States

October Term, 1933.

THE STATE CORPORATION COMMISSION FOR THE STATE OF KANSAS, HOMER HOCH, JESSE W. GREENLEAF, ET AL., *Appellants,*

vs.

THE WICHITA GAS COMPANY, THE HUTCHINSON GAS COMPANY, THE NEWTON GAS COMPANY, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Kansas.

No. 114.

SUPPLEMENTAL BRIEF OF APPELLEES ON QUESTIONS OF JURISDICTION ARISING ON ORAL ARGUMENT.

In view of the fact that attorneys for the appellant during oral argument and in answer to questions by the Court stated that the appellant did not now take the position that appellees were estopped at any time and in any subsequent proceedings to have reviewed by the

courts the reasonableness or legality of the orders of the Kansas Commission of August 31, 1932, and that said orders were at all times open to judicial review if attempted to be enforced, appellees requested the Court for an opportunity to file this supplemental brief, the granting of which request is greatly appreciated.

Appellees were greatly surprised at the admissions made by counsel to the effect that the Commission did not now claim any of the orders made by it in this proceeding were of any binding effect upon anyone, or were other than preliminary steps taken in a proceeding the purpose of which was to ascertain rates; and this contention being the opposite of any contention theretofore made, appellees naturally did not discuss the matter in their original brief.

We understand the questions now presented are: Did the court below on the allegations of the bills have jurisdiction of the case as originally instituted? If so, was such jurisdiction defeated because of some concession made during the progress of the case? The bills by proper and substantial allegations presented a federal question. In a case in which the jurisdiction of the District Court is properly invoked upon a substantial controversy arising under the constittuion of the United States, the jurisdiction of that court and of this court of appeal extends to the determination of all questions involved, including questions of state law, irrespective of the disposition that may be made of the federal questions and whether it be found necessary to decide them at all. *Greene* v. *Louisville and Interurban Railroad Company,* 244 U. S. 499; and *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175.

Jurisdiction of the court below.

Ten separate bills of complaint were filed by the ten distributing companies, appellees herein, all being in substantially the same form as the bill of complaint of the Wichita Gas Company, appearing in the Record at page 1.

In these bills of complaint it was alleged that the two orders of August 31, 1932, and each of them were

> "—unlawful, unreasonable, and void because in direct violation of the constitution and laws of the State of Kansas, and the constitution and laws of the United States, as hereinafter specified."

The orders were not alleged to be unconstitutional for one, but for many reasons, among which were that one order by its terms became effective immediately instead of thirty days from the making thereof; that the Commission made no finding as to the reasonableness of existing rates as required by Sections 66-110 and 66-113, Revised Statutes of Kansas, 1923 (R. 19); that the Commission did not fix any rates to be substituted for existing rates as required by Section 66-110 (P. 20); that the Commission undertook to fix rates without affording plaintiff its day in court or an opportunity to be heard (R. 20); that the rates established were confiscatory; that the Commission had no jurisdiction to act in the manner attempted (R. 21); and that in all these and many other respects the orders and each of them were void

> "—in that they deprive plaintiff of its property without due process of law; deny it the equal protection of the law; impair the obligation of its contracts; undertake to legislate with respect to interstate commerce and usurp the business management

> of the plaintiff company, all in violation of the constitution and laws of the United States and of the State of Kansas, and particularly Clause 3 of Section 8 of Article 1, the first sub-division of Section 10 of Article 1 of the constitution of the United States, and the 14th Amendment thereto." (R. 22.)

When under these bills of complaint the proceeding came on for hearing on plaintiff's application for a temporary injunction, attorneys for the Commission admitted that the order, Exhibit "M," was void for the reason that by its terms it became effective immediately instead of thirty days after the date it was issued.

No separate judgment or decree was entered upon the Commission's admission that Exhibit "M" was invalid, and the case was before the lower court until its final decree on all the issues raised by the pleadings except as modified by the Commission's admission.

During the course of the proceeding plaintiff offered evidence proving that if the distributing companies were required to pay 40 cents per M. C. F. for gas at their respective city gates and base their rates on a price of 30 cents per M. C. F., they would not even make their operating expenses. (R. 371.)

It is doubtful whether the orders or either of them were void because made immediately effective, as the statute does not prohibit the making of such an order, but merely defers its effective date. The statute, Section 66-115, R. S. 1923, is as follows:

> "*Effective date and reasonableness of orders.* All orders, regulations, practices, services, rates, fares, charges, classifications, tolls, and joint rates fixed by the commission shall be in force and effect on and after thirty days from the making thereof and expiration of thirty days after service aforesaid, shall

be *prima facie* reasonable unless, or until, changed or modified by the commission or in pursuance of proceedings instituted in court as provided in this act. (L. 1911, ch. 238, Sec. 18; May 22.)"

If the effective date of the order had been the sole ground for challenging its validity, the court could have well said the rates therein prescribed should be effective October 1, instead of September 1, and all objections would have been met.

The court below considered before it at all times all issues as to the validity of the orders on all of the grounds alleged, and made findings on the issues so raised, findings Nos. XX and XXI being as follows:

> "XX. If the distributing companies are compelled to pay 40 cents per thousand cubic feet for gas at the city gates, and to base their rates to the consumers upon the price fixed as reasonable by the Commission, no one of them will have earnings in excess of operating expenses, applicable to depreciation and return. (R. 319.)
>
> "XXI. The distributing companies could not continue their business and pay the Cities Service Gas Company 40 cents per thousand cubic feet, and predicate their rates to the consumers upon 30 cents; the Cities Service Gas Company could not continue its business without the patronage of the distributing companies. (R. 319.)

Conclusions of law were made on the above and other findings, and the decree was based on the findings and conclusions and not on any attempted admission or confession.

In addition to the issues raised by reason of the allegations in the several bills of complaint that the orders in question deprived the plaintiffs of their property with-

out due process of law, denied them the equal protection of the law, impaired the obligation of their contracts and confiscated their property by reason of the rates attempted to be established therein, the issue was also presented to the court below as to finding No. 11 of the order of August 31, 1932 (Ex. "L," R. 59), which finding was as follows:

> "That the costs hereof incurred by the Commission herein, amounting to $66,936.08, should be taxed to and paid by the respondents."

In addition to this item of $66,936.08 taxed as costs by the Commission, the court in its finding under the heading, "Operating Income" (R. 314), in effect found that the appellees had been to an expense of $250,000.00 in the preparation and presentation of the case before the Commission.

The court below, therefore, had before it the issue as to whether the Kansas Commission could compel the appellees to pay this item of $66,936.08, and whether the Commission could in the manner attempted put the appellees to an additional expense of $250,000.00 without violating their constitutional rights.

It seems to us that if the Kansas Commission by reason of the above finding is endeavoring to compel plaintiffs to pay this large sum of money and is doing so unlawfully, it is confiscating plaintiffs' property just as truly as if rates were established which failed in that sum to produce a reasonable return.

The Kansas statute under which these costs were taxed, Chapter 240 of the Session Laws of Kansas of 1931, is as follows:

"Section 1. That whenever, upon any investigation of a public utility made by the public service commission, on its own initiative or upon complaint filed, the commission shall find that any rate, toll, charge or schedule or joint rate is unjust, unreasonable, excessive, insufficient or unjustly discriminatory or preferential or otherwise in violation of the public utility act; or that any measurement, regulation, practice, act or service is unjust, unreasonable, unsafe, insufficient, preferential or discriminatory or otherwise in violation of the public utility act; or it shall find that any service is inadequate or that any service that can reasonably be demanded is not being furnished; or when an investigation is necessary because of an application by a public utility and such application is not justified, the commission shall ascertain and declare and by order fix the expenses incurred by the commission upon such investigation and shall by such order direct such public utilities to pay to the state treasurer to reimburse the fund appropriated for the public service commission an amount to cover the expenses so incurred: *Provided,* That such order shall not become operative unless the matter in connection with which such investigation shall have been made shall have been finally determined, by appeal or otherwise, adversely to such public utility. The Commission shall cause a certified copy of all such orders to be delivered to an officer or agent of the public utility affected thereby, and all such orders shall, of their own force, take effect and become operative twenty days after final determination of the investigation by appeal or otherwise: *Provided,* That if appeal is taken by any public utility a surety bond shall be furnished by such utility to secure the payment of such expenses in case the order of the commission shall be sustained."

It will be noted that this statute provides that the order of the Commission taxing costs shall not become effective until the matter under investigation "shall have been finally determined, by appeal or otherwise, adversely to such public utility," and that all such orders shall become operative twenty days after final determination of the investigation by appeal or otherwise. If then, the appellees herein had not filed their several bills of complaint in the court below, the finding directing them to pay this $66,936.08 would have become conclusive and appellees would have been compelled to make payment.

It will be noted also that under this statute there must be a determination adverse to the public utility, and it follows that the court below (if it felt that Exhibit "L" should not fall by reason of the admitted invalidity of Exhibit "M") could not determine whether the appellees should be required to make this payment without first determining that the order requiring the payment was either illegal or unreasonable. Without regard to the matter of rates, the court had to do exactly what it did do in order to determine this issue.

It should be perfectly apparent that if appellees had not filed their several bills in the court below and sought the relief which they did seek, both the orders, Exhibit "M" and Exhibit "L," would have become effective; plaintiffs would have been required under the provisions of order, Exhibit "M," to put into effect rates which would not even return them their operating expenses, and would in all future rate cases have been met with the contention that the order, Exhibit "L," establishing a 30 cent city gate rate was conclusive and binding upon appellees and would have been compelled to pay $66,936.08 costs.

We are entirely unable to understand how it can be contended or even thought that the Commission could by admitting the invalidity of Exhibit "M" on one of the many grounds on which it was alleged to be illegal and unconstitutional divest the jurisdiction which the lower court clearly had at the time the several suits were filed. If at the time this admission of invalidity was made the court below had dismissed the bills of complaint for the reason that no further issues remained for its determination, the rates established for appellees in Exhibit "M" would not and could not have been enjoined but would have forthwith gone into effect, and appellees would have been compelled to pay the large sum of $66,936.08 thereby suffering confiscation of their property not only to the extent of the unreasonableness of the rates fixed, but to the extent of $66,936.08 in addition thereto. It is solely by reason of the decree below that these orders are not now in effect and if the case had been or should now be dismissed they would become effective.

We do not desire to go over matters discussed in our original brief, but desire again to earnestly call the attention of the Court to the fact that these two orders were originally one order, that of July 20, 1932; that there is no explanation now before this Court, nor has any been attempted, as to why two orders were issued instead of one on August 31, 1932; that the orders were not in fact made in good faith or for any proper or legitimate purpose, and should now be considered as one. If considered as one, the part of the order fixing rates was admitted by appellant to be invalid on one ground, and was found by the court to be invalid as to that ground and for the reason that it was confiscatory. This left

nothing but the order Exhibit "L" upon which the order establishing rates was based which should have fallen and been permanently enjoined as a part of one invalid order.

If the orders are to be considered as two separate and distinct orders, then the order Exhibit "M" establishing rates should be enjoined because the rates were confiscatory, and the order Exhibit "L" which found 30 cents to be a reasonable city gate rate should be enjoined for the reason that the Commission had no authority to make it and for the reason that included in it was the direction to appellees to pay $66,936.08, thereby confiscating their property to that extent. That the Commission had no authority to issue the original order calling companies operating in 135 cities before it except to establish local rates is clear from a reading of the statute, Chapter 239, Session Laws of 1931, quoted in our original brief at page 2. All authority for the Commission to act is purely statutory as it is a creature of the statute. Any attempted assumption of jurisdiction beyond that expressly conferred is void.

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules

enjoined and show a substantial compliance therewith to give validity to its action." *Wichita R. R.* v. *Public Util. Comm.*, 260 U. S. 48, 58.

The bifurcated order was an attempt to trick the distributing companies so that they would not be able to attack the order in court until the order reducing the 40 cent rate had become binding and in a sense *res adjudicata*. This was expressly and emphatically stated before the Commission as set out in our former brief at page 168, and was reaffirmed in the court below. The lower court said that this kind of a proceeding could not be tolerated. (R. 284.) If permitted to stand, this dual order would not only have bound the distributing companies as to the 30 cent gate rate order but would have immediately deprived them of their income by the overnight reduction of rates. There was no alternative for the companies except to defy the Commission, treat the whole proceeding as a nullity, or appeal to the courts for protection. The complaints were filed. To have taken the other horn of the dilemma and to have defied the Commission would have subjected the companies not only to severe pains and penalties but to proceedings for receivership which were openly threatened by the Governor of the State who had ordered the defendant Attorney General to institute court proceedings seeking dissolution of the several companies and asking the appointment of receivers. This is set out in the bill of complaint at page 22. This proposed prosecution which amounted to duress was widely advertised in the public press. It is also alleged in the bill that the plaintiffs would suffer irreparable injury; that the penalties provided for infraction of orders of the Commission are so enormous, cruel and unusual as to intimidate the plaintiff

and force it to abandon any rights it may have to act independently thereof; that the plaintiff would be unable to make collection from its consumers for gas sold and delivered to them if it attempted to act contrary to the orders in the absence of relief by the court. (R. 24.) These allegations gave the court jurisdiction. The orders had actually been promulgated and the threats had actually been proclaimed and published by the Governor and the Commission. We do not know how a better case for injunction could be stated than is found in these bills of complaint. After the restraining order had been issued and at the hearing for issuance of a temporary injuction, counsel for the Commission on September 24, 1932, appeared in open court and stated that the threatened receivership proceedings would not be filed and admitted that the second part of the bifurcated order was invalid because under the statutes of Kansas orders of the Commission fixing rates could not become effective within thirty days. This, however, was only a statement of counsel and there was no order of the Commission canceling or rescinding that portion of the order which was said to be invalid. The answer filed on October 3rd, however, contains an admission that the order, Exhibit "M," is unlawful and therefore void under the laws of the State of Kansas. (R. 255.) The jurisdiction of the court had already attached. A court of equity had already reached out its protecting arm to save the complainants from being subjected to the unlawful acts which were being threatened. Defendants could not rob the court of that jurisdiction by coming in and confessing that one of the facts alleged was true. The jurisdiction of a court cannot be taken away by any such confession of wrong-doing by the defendant. The confession only

confirms the jurisdiction and justifies a judgment in favor of the plaintiff and against the defendant.

In the case at bar, the defendants might have come in and said, "We did not issue the order or the order did in fact allow thirty days' time, or that all requirements in respect to its issuance had been complied with" but it did nothing of the sort. It admitted the issuance of the order and then admitted that the order should not have been issued. The court thereupon and after the hearing on the merits issued its injunction against both orders (R. 361) and justified its jurisdiction in the opinion. (R. 282.)

How is it possible for a defendant to defeat the court of jurisdiction which has once been lawfully acquired by merely dissolving the issue by a confession of some of the allegations of the petition? This to us seems unthinkable.

As stated in our former brief, it is our contention that upon announcement by counsel for the Commission and especially upon the filing of the answer, the court could and should have entered a permanent injunction and ended the case without the expense of further hearing. The case in that sense only therefore became a moot case because without it there was no rate order, but the case was not subject to dismissal and the court was not deprived of its jurisdiction. It may have done an unnecessary thing in proceeding with the lengthy hearing, but its decree when entered did not become invalid and of course should not be set aside by this court.

During argument as to the binding force of the first part of the order, finding that the city gate rate should be reduced from 40 cents to 30 cents, in open hearing before the Commission counsel for the Commission were pressed to an answer and there stated that it was the

contention of the Commission that an order reducing the city gate rate would be absolutely binding upon the distributing companies as soon as it had been in effect thirty days and was not appealed from or attacked in court. See our original brief, page 160. This same question was presented to counsel at the hearing before the three-judge court and the position of the Commission was again reiterated. Judge McDermott interrogated Mr. Hatcher particularly on this point and asked him almost the identical questions which were propounded to Hatcher and Welch by Justice Roberts at the hearing in this court, to-wit: whether it was the contention of counsel that a rate could be built up by making findings and orders respecting the several component elements of a rate and each order become successively binding upon the distributing companies so that when the final order was made only one single element, for instance, the rate of return, would be open to attack because each of the others had become successively binding. It was then stated as it was first stated in this court that such was the contention of the Commission. This called for the statement of Judge Phillips in his opinion (R. 283) where he says:

> "Had the distributing companies failed to appeal from such order or seek a judicial review thereof within thirty days from August 1, 1932, it would have become final on September 1, 1932 (Sec. 66118, R. S. Kan. 1923), and the facts therein found would have become *res adjudicata* and, in that event, at the hearing under the last paragraph of the second order, the companies could not have defended against an elimination of such items as a part of their operating cost in fixing their rates."

But now, at the oral argument in this court, counsel again shift their position because they recognize the *reductio ad absurdum*. They frankly admit, as did Mr. Welch, that it is their present position the order would not be binding and that they will not now contend it to be binding. This is inconsistent with the position formerly taken by them, not only in the hearing before the Commission but also before the trial court. Is it possible that by thus shifting around on these two issues, the Commission can finally win this lawsuit after compelling the distributing companies to resort to a court of equity for protection against the orders which the Commission had leveled at them, which the Commission then claimed were valid and binding orders and would become *res adjudicata*, but which they now say were invalid and ineffective and could not become binding until applied in a specific hearing as to each distributing company in which its property is valued, its net income analyzed, and proper rate of return determined? We quote from the lower court at page 283 as follows:

> "If the construction of counsel for the Commission is correct, the order is plainly an attempt to avoid a judicial review in this court of the matters therein determined, and to deprive the distributing companies of their constitutional rights. This cannot be tolerated."

As to appellant's contention in this court that order Exhibit "L" is merely a step in a rate case and not a final order and therefore not subject to injunction.

As we recall the statements made by counsel for appellant on oral argument it was contended that this whole proceeding was merely a step in the process of

rate making which the Commission intended to apply in the future if and when rates to consumers came under its consideration, and valuations and audits were made of the properties of the several appellees.

We contend the proceeding as instituted by the Commission was not a rate case both because of the caption of the proceeding, hereinafter quoted, and because it was not a proceeding to ascertain the reasonableness of a rate or charge to be made by any public utility which is the only proceeding authorized by the statute under which the Commission assumed to act. Throughout the entire proceeding the Commission insisted it was not a rate case, and on that ground excluded all evidence as to the value of the properties of the several operating utility companies and all evidence as to their operating experience. Nevertheless, upon the termination of the proceeding the Commission entered a rate order. Upon rehearing this order was split into two parts, one of which fixed a city gate rate applicable to all utility companies, Exhibit "L"; and the other fixed a rate to the ultimate consumer, Exhibit "M." Therefore, although the case was not instituted as a rate case or treated as such by the Commission throughout the long hearings before it, it ended as a rate case with the final orders above recited, each of which it was contended would be conclusive unless set aside by the courts as provided by the statutes.

At this point surely the appellees were entitled to recourse to the courts as to the order fixing a rate to the consumer which was claimed to be confiscatory; and likewise they were entitled to recourse to the courts as to the order which fixed a city gate rate.

Upon the hearing in the court below, the Commission admitted the invalidity of order Exhibit "M" and con-

sented that it be permanently enjoined. But this could not oust the court of jurisdiction originally obtained. On the Commission's own admission this injunction should stand. As to this branch of the case, the decision below is a judgment by consent, and therefore is not subject to review.

When the case reached this Court, the Commission again made a shift of position, this time with respect to the order fixing the city gate rate, Exhibit "L," reversing the position always taken below, and contended that such order was not final and binding or *res adjudicata*. But this last position cannot affect the situation except in the court below.

On the facts then before the court below, its injunction was proper and therefore its decree should be affirmed.

We have joined in this one proceeding before the Commission ten companies operating in 135 towns and communities, each separate and distinct from every other property, and all of the value of $15,326,298.00. (R. 7.)

There is no rate case pending as to any of these properties, and without the pendency of such a proceeding, the Commission was without any authority whatever to act. As pointed out in our original brief, the statute under which the Commission is proceeding (Original brief, page 2), gives the Commission authority to act only

> "—in ascertaining the reasonableness of a rate or charge to me made by a public utility."

It cannot be said that any public utility has a rate case by reason of this proceeding. The order instituting the

investigation cannot possibly be construed as an order instituting a rate case. The title of the proceeding is:

> "In the Matter of the Investigation of the Reasonableness of Contracts and Charges Made by Holding Companies to Subsidiary Companies of the Cities Service Company."

There is nothing whatever in the above language to indicate that the rates of any company were under investigation or that the Commission intended to fix the rates for any company. As pointed out in our original brief, pages 160 to 171, the Commission repeatedly stated it was not a rate case, and repeatedly refused to permit any of the appellees to show the value of their properties or their operating experience. Again before the court below when evidence was introduced as to the value of the properties of the several distributing companies and their operating experience, the Commission objected on the ground that it was not a rate case. (R. 371.) If it was not a rate case, as repeatedly stated, then the Commission had no authority to act and the whole proceeding is void and unconstitutional.

If under any possible theory the order issued by the Kansas Commission (R. 25), or the proceedings had before it, can be construed as a rate case for any particular property or company, then certainly the Commission could not lawfully or in good faith take the position that in that proceeding it could find 30 cents instead of 40 cents to be a reasonable city gate rate, and that unless the several companies involved sought a review in court of the reasonableness and legality of the Commission's finding, they would be forever and conclusively foreclosed, and all future rate proceedings

would start from the city gate rate so found. This is exactly the contention that was made before the Commission, and the contention that was made in the court below. On page 168 of our original brief, we have shown from the record exactly the position taken by the Commission:

> "Mr. Stone: Yes, but would they be forceclosed on the question of whether 40 cents was a reasonable rate or not?
> Mr. Hatcher: Absolutely."

This position was taken before the Commission, and the rulings of the Commission in refusing to hear evidence as to the value of the distributing company properties or their operating experience, and in refusing to give them their day in court as to their local rates, were all predicated on the finding of the Commission becoming absolute.

It is our contention that the proceeding before the Commission by the terms of the order instituting it was intended to be and was limited to the ascertainment of the prices which the several appellees should pay for gas at their respective city gates, and that it was not intended to be and could not, under the Kansas statutes, be merely a step in the process of arriving at rates for the several distributing companies. This proceeding was concluded by the issuance of the orders in controversy. Thereafter the Commission itself could not change such orders, and certainly counsel could not change them or their effect by any admissions they might make in court or elsewhere.

In the case of *State ex rel.* v. *Atchison, Topeka & Santa Fe Railway Company,* 109 Ks. 847, the syllabus by the court reads:

> "Mandamus — Utilities Commission — Changing Railroad Freight Rates — Notice of Hearing Required. The Public Utilities Commission cannot, by declaring that it retains jurisdiction of a matter in which it makes a complete order fixing railroad freight rates in response to an application pending before it, defeat the necessity of giving the thirty days' notice required by Section 8341 of the General Statutes of 1915, in a subsequent proceeding in the same matter to cancel the order first made."

The holding of this decision is, that even if the Commission retains jurisdiction, which it did not do in this case, it could not subsequently proceed to change any order previously made without giving the utility concerned thirty days' notice as required by the statute. There has been no change in the statutes since this decision was handed down, and the Commission could not at this time, or at any other time, without thirty days' notice change in any respect the orders which it made, or set them aside. If the Commission itself could not do so, clearly counsel cannot.

Under the statutes and this decision, the Commission could not attempt any application of its finding of the city gate rate to local rates without thirty days' notice. It could not in the proceeding now under consideration give notice of a hearing as to local rates for any one of the 135 cities involved, for it has repeatedly said this is not a rate case (as its order calling the investigation shows); has repeatedly refused to receive or consider evidence as to local rates, and has taken the definite posi-

tion in this Court that local rates were not involved (a position entirely inconsistent with the fact that a rate order, Exhibit "M," was actually issued). Also the voluminous record so far made is as to all companies, not as to any one, and it would be impossible for any one distributing company to present to any court the matter of its local rates as distinguished from rates for the whole 135 properties. This is exactly the position the Commission and its counsel at the time took as is shown by the following quotation from the proceedings set out at page 166 of our original brief:

> "Mr. Hatcher: We are not taking the position here, are we, or are you, Judge, that the over-all picture shows a decrease in rates? There may need to be reductions in some places, they would have to be treated separately, and the way this evidence has gone in, it has gone in collectively."

If the Commission cannot reopen this case and treat it as a case involving local rates for one company, all it could possibly do would be to issue another order under a separate docket number and start all over again, in which event nothing done in the past would be competent, relevant or material.

In this connection it should be borne in mind that the counsel who appeared for appellant in this Court are not state officers or even regular employees of the state. The Kansas Commission has its own attorneys, and the Attorney General has his own assistants. None of these attorneys or assistants appeared in this case, but on the contrary the Commission and the State are represented solely by special attorneys hired for the purposes of this case and none other. In their brief which was presumably prepared under the direction and subject to the approval

of the Commission, there is no indication of any such claim or contention as was made on oral argument, and we submit that counsel were without power or authority to speak for the Commission or bind it in any respect as to the nature of the proceeding which it conducted, or its future intentions with respect to such proceeding.

The section of the statute under which the costs of $66,936.08 were taxed against appellees, we have heretofore quoted. This statute shows that the taxing of costs is the last thing to be done in an investigation, and can only be done at the conclusion of an investigation. The statute contemplates that upon such order being made, the parties subject to the payment of the tax have the right to immediaely go into court and have the reasonableness and legality of the Commission's order determined. If the order is by the court held to be illegal or unreasonable, the order taxing costs falls. If this proceeding, as contended by counsel on oral argument, is merely a step in the process of rate making, then there is no protection whatever given appellees as to the payment of these costs.

In the foregoing discussion we have undertaken to consider general principles of law without regard to the Kansas statute except as that statute limits all power on the part of the Commission to conduct such an investigation to a proceeding

> "—in ascertaining the reasonableness of a rate or charge to be made by a public utility."

We have, however, called the Court's attention to the fact that the Kansas Commission is a creature of the statutes and has no power other than that expressly granted. This statute which we have set out at page 2 of

our original brief not only limits the power of the Commission to an investigation concerning rates, but expressly limits the nature of the showing which the Commission can require as to the cost of services and commodities furnished by affiliated companies. This part of the statute is as follows:

> "Such showing shall consist of an itemized statement furnished by the utility setting out in detail the various items, cost for services rendered and material or commodity furnished by the holding or affiliated company."

Instead of following this mandate of the statute, the Commission undertook to order the several appellees herein to make a valuation of the entire property of the Cities Service Gas Company, undertook to do so itself, and undertook to proceed in exactly the same manner as if it were determining the price to be charged by the Cities Service Gas Company for the commodity sold by it in inter-state commerce. We submit that under the foregoing statute the entire proceeding of the Commission was unauthorized and void.

If the proceeding before the Kansas Commission is to be considered as a completed rate case with a final order establishing rates for domestic consumers (as it must be or the final order, Exhibit "M," would not have been issued), then the court below had jurisdiction as otherwise rates would be now in effect not even producing operating expenses, the appellees would be foreclosed and estopped to question the reasonableness or legality of the thirty cent city gate rate in all future proceedings and the costs of $66,936.08 would be collected. It is only the injunction below which prevented the happening of all these things, or now prevents them. A removal of

the injunction by dismissal of the case below would leave the plaintiffs where they were originally, with confiscatory rates, the cost burden of $66,936.08, and a lack of opportunity in the future to question the reasonableness or legality of the city gate rate found by the Commission. If the case below should be dismissed, there is nothing whatever to prevent the Commission from again changing its mind and attempting the enforcement of its orders now enjoined. The Commission said in the beginning and all through the lengthy course of the hearings before it that the proceeding was not a rate case, then made it one; said the plaintiffs would be foreclosed to question the city gate rate found by the Commission, then said in oral argument here they would not. There is no protection in self-serving declarations by the Commission as to what it intends to do. There is no record of what has been said here on oral argument, nor any reason to believe the Commission approves or, in the absence of judicial restraint, will recognize the statements here made. The court should hold the proceeding before the Commission to be a completed rate case, and that the court below had jurisdiction.

If the proceeding instittued by the Commission was not a rate case, then the Commission had no authority to act under the Kansas statutes or the decisions of this court; had no authority to order 135 separate properties before it and then refuse them a hearing as to local rates; declare them foreclosed to question the Commission's findings; tax them with costs amounting to $66,936.08; cause them to incur an expense of $250,000; go out of the state and the limits of its jurisdiction to value property used in interstate commerce and make audits of the books of an interstate company; undertake to regulate interstate commerce by eliminating operating expense items, and

end it all with a rate order fixing local rates. If not a rate case, then it is not a step in such a case for there is no rate case in which it can be a step.

In any view which may be taken of the proceedings had, an order in two parts was issued, finding a city gate rate and putting it into effect by establishing local rates based thereon. This two-part order and each part of it were alleged in the bills of complaint filed in the court below to be invalid and unconstitutional for many federal reasons, and the court found them so to be and decreed a permanent injunction. The court below treated the two orders as in effect one, and in the same manner as if the order issued July 20, 1932, was before it for consideration, instead of that same order divided into two parts. As stated in the original brief, when the part of the order applying the findings of the Commission to local rates was admitted to be invalid and was found by the court to be confiscatory, each and every part of the two orders should have been permanently enjoined. *The appellant did not appeal from the decree of the court below permanently enjoining that part of the orders fixing local rates* (*Exhibit "M"*); the injunction as to that order is not before this court and in our view of the case this court has no authority at this time to set it aside or order a dismissal of the case in the court below. If set aside, such action by this court would in effect be and would be construed as an approval of all that the Kansas Commission has done, and would be construed by the Commissions of Missouri, Oklahoma and Texas as giving them and each of them authority to do the same thing, cause the same expense, tax the same costs, make the same valuations of property used in interstate commerce, the same audits of interstate business, substitute their judgment for the business

judgment of the officers and directors of an interstate company, regulate such interstate business by the elimination of items of operating expense, and generally burden such interstate commerce in such manner as to ruin it utterly; and all this under the claimed authority of the decision of this court in the case of Smith against Illinois Bell Telephone Co., and the decision of this court in the case of *Western Distributing Company* v. *Public Service Commission.* Surely, plaintiffs below were entitled to relief against this outrage, the court below had jurisdiction to grant the relief prayed for, and this court should affirm its decree or dismiss the appeal.

In this brief we have not attempted to cover the discussion as to jurisdiction set out in pages 1 to 51 of our original brief, all of which we consider material in the consideration of the questions here presented.

It should also be borne in mind that so far as the court below was concerned, jurisdiction did not depend upon a federal question alone but as to three of the plaintiffs, the Western Distributing Co., Union Public Service Co., and Cities Service Gas Co., attached by reason of diverse citizenship of the parties.

This court should judge the Commission by what it did and not by what it said or now says, and should hold that the proceeding before it was a rate case completed by a final order fixing local rates, Exhibit "M," admitted to be invalid and found by the court below to be void for the reason that it established confiscatory rates, and because plaintiffs were denied due process of law by reason of the refusal of the Commission to hear any evidence upon which valid local rates could be established, and this appeal should now be dismissed because appellant did not appeal from the decree permanently enjoining it and there is nothing before this

court for determination, or the decree below should be affirmed.

If the court should, however, hold the proceeding to be a mere step in an incomplete rate proceeding, it should hold such proceeding unauthorized by the Kansas statutes or the decisions of this court, and a proceeding the purpose of which was to determine one item of operating expense, the determination of which would be conclusive in 30 days unless appealed from, and then proceed to the determination of some other item, the determination of which would likewise become conclusive in 30 days, eventually leaving nothing but the final determination of one element open to review, and should affirm the decree of the court below, for the reason that such practice is open to every constitutional objection and should be condemned.

Throughout the entire course of this proceeding we have never known or been able to find out what it was all about, what the Commission intended to do, or where it would end. It has changed its position constantly and we have been compelled to meet the changes as best we could. We contend, however, that the best evidence of what the Commission intended to do is what it actually did, and that is, establish local rates for 135 properties in one proceeding in which it refused repeatedly to hear any evidence on which to base local rates. It admits the order as to local rates is void, which the court below found, and attempts to save itself by saying that it did not intend to do what it did and that the order fixing local rates should be forgotten and forgiven and it should be permitted to start over again. Where it will start, where it will go, or where end, it does not even suggest.

The only answer is, that the whole proceeding was unauthorized, violated every constitution principle of due

process of law and that no lawful or valid orders did or could or in the future can result therefrom. It is not a step, but the end of a misconceived, unfair, unreasonable, unauthorized and unconstitutional course of conduct which should be emphatically disapproved.

We desire to call the Court's attention to the fact that this brief is on behalf of the appellees other than the Cities Service Gas Company and that we have not undertaken to discuss the issues presented on oral argument as applying to it. The Cities Service Gas Company filed a separate bill of complaint in the court below (R. 184) which presented an entirely different issue from that presented by the distributing companies. The Cities Service Gas Company was not a party to the proceeding before the Commission and the orders complained of were not directed to it. Its cause of action was based on the fact that the Commission had by reason of its illegal action issued orders to its customers, the effect of which was to destroy its business. The decree entered by the court below was in favor of the Cities Service Gas Company as well as all the other appellees herein, and this court should in considering the issues now presented also consider the allegations of the bill of complaint of the Cities Service Gas Company, its brief, the assignment of errors filed by the appellant, and the decree of the court below as the same applies to the allegations of the bill of the Cities Service Gas Company.

Respectfully submitted,

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APPENDIX.

Section 66-151 of the Revised Statutes of Kansas, 1923, is as follows:

> "Certified copies and conclusiveness of rates, regulations and orders. Upon application of any person, the commission shall furnish, free, certified copies of any classification, rates, rules, regulations, or orders; and such certified copies, or printed copies published by authority of the public utilities commission, shall be admissible in evidence in any suit, and sufficient to establish the fact that in any charge, rate, rule, order or classification therein contained, and which may be in issue in the trial, is the official act of the public utilities commission; and such determinations and orders of the commission shall be *prima facie* evidence, in any action in which they are offered, of the reasonableness and justness of the classifications, rates and charges involved therein and of all other matters therein found and determined; and after the lapse of thirty days from the time such determinations and orders shall be made, no suit then pending to set the same aside, and they remaining in full force and effect, such determinations and orders shall be held to be conclusive as to the matters involved therein. A substantial compliance with the requirements of this act shall be sufficient to give effect to all determinations and orders made and established by the commission. (L. 1905, ch. 340, Sec. 11; March 21.)"

We invite the Court's attention to the consideration of this statute in connection with our argument that appellees were compelled to go into court at the time these suits were filed, or would thereafter be forever foreclosed from so doing, and that no statements made to this Court by attorneys for appellant can change the force and effect of the above statute.

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